SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 339

CHESLEY W. JURNEY, PETITIONER

vs.

WILLIAM P. MACCRACKEN, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Court of Appeals of the District of Columbia

No. 6166.

WILLIAM P. MACCRACKEN, JR., Appellant,

vs.

CHESLEY W. JURNEY.

a Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MACCRACKEN, JR., Petitioner.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition.*

Filed February 12, 1934.

In the Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MACCRACKEN, JR., Petitioner.

To the Honorable the Supreme Court of the District of Columbia:

The petition of William P. MacCracken, Jr., respectfully shows:

1. Petitioner is a citizen of the United States and a resident of the City of Washington, District of Columbia.

2. Petitioner is now restrained of his liberty in the District of Columbia, within the jurisdiction of this court, by one Chesley W. Jurney, Sergeant at Arms of the Senate of the United States, unlawfully and without due process of law, and in violation of petitioner's rights under the Constitution.

3. Petitioner is held by said Chesley W. Jurney under color and claim of authority of the Senate of the United States, by virtue of an order or warrant signed by the President of the Senate directing the said Jurney as Sergeant at Arms to take petitioner in custody and bring him to the bar of the Senate to show cause why he should not be punished for contempt of the Senate on account of the destruction and removal of certain papers, files, and memoranda from the files of petitioner after a subpœna had been served upon petitioner to produce certain papers, books and records before a committee of the Senate of the United States, as will hereinafter more fully appear. A true copy of said warrant or order of arrest is hereto attached, made part hereof, marked *Exhibit A*. Said warrant was issued pursuant to a resolution of the Senate adopted on the 9th day of February, 1934. Petitioner is restrained of his liberty only under and by virtue of said warrant, and not by virtue of any judgment or order of any court of justice.

4. Petitioner avers that no act of his is or was a contempt of the Senate nor a breach of its privileges; that the Senate is without jurisdiction to try or punish petitioner for the matters referred to in said warrant, or in the resolution directing its issue, and is without lawful power or right to arrest petitioner to answer a charge of contempt based thereon; and that the arrest and detention of petitioner under said warrant is without due process of law, is beyond the constitutional power of the Senate, and is in violation of petitioner's constitutional rights.

5. The facts upon which the Senate asserts its right to try and punish petitioner for contempt of the Senate are hereinafter fully set forth.

6. On the 25th day of February, 1933, the Senate of the United States adopted a resolution, known as Senate Resolution 349, 72nd Congress, Second Session, a copy of which

is hereto attached, marked *Exhibit B*, and made a part hereof.

7. On the 31st day of January, 1934, there was served on petitioner a subpœna duces tecum issued by the Committee of the Senate appointed under the aforesaid Senate Resolution 349 commanding petitioner to appear before said Committee "instanter" and to—

"bring all books of account, bank passbooks, cancelled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air-mail and ocean mail contracts."

Copy of the said subpœna is attached hereto, marked *Exhibit C*, and made a part hereof.

8. Compliant to the command of said subpœna, petitioner did appear before said Committee on January 31, 1934, and again on February 2, 1934.

9. Petitioner is an attorney at law and he had at various times during the past ten years been employed as such by individuals and corporations engaged in the operation of airplanes over designated routes, and otherwise, and had rendered to his said clients services as attorney some of which services related to airmail contracts, and many of which services had no relation to airmail contracts. Under the filing system maintained in petitioner's office as an attorney at law in the City of Washington there were and are no such things as airmail contract files. File folders pertaining to the correspondence and documents relating to matters in connection with which petitioner was employed by any client having any airmail contracts con-

3 tained all papers, including memoranda, mail and telegraphic correspondence, etc., received from such petitioner's client, and copies of papers sent to said client, relating to said client's matters, as well as all other papers pertaining to matters referred to petitioner by any such client, or handled by petitioner for the client. Hence in numerous instances, at the time of the issuance of said subpœna, *Exhibit C* hereto, file folders contained papers relating to matters other than airmail contracts as well as, in the case of clients who had such contracts, papers relating to that subject. Among the papers in the possession of petitioner when said subpœna was issued were many communications relating to airmail contracts re-

ceived by him as attorney from his clients, and copies of many communications relating to airmail contracts sent by him as attorney to his clients as such.

Prior to the time of the service of said subpœna, investigators employed by the said Committee appeared at the office of petitioner and stated that they had been sent by said Committee to examine all the files in the office of petitioner regardless of what they pertained to, but thereafter limited their demand to an examination of all the files in petitioner's office which in any way pertained to airmail and ocean mail contracts. Said investigators informed petitioner, and on information and belief petitioner avers the fact to be, that they had been directed to make this examination of petitioner's files by said Committee.

Following said demand and the service of said subpœna petitioner appeared before said Committee and then and there made a statement, was interrogated and answered questions, all as fully appears in a transcript of stenographic report of proceedings before said Committee on said 31st day of January, 1934, copy of which is hereto attached, marked *Exhibit D*, and made a part hereof.

10. As appears from said *Exhibit D*, petitioner stated to said Committee, in substance, among other things, that he stood ready to produce to the Committee all papers called for in the aforesaid subpœna, excepting only communications between himself, as attorney, and his clients; that, as petitioner understood the law, communications,
4 whether oral or written, between attorney and client, relating to the subject matter of the attorney's employment, are privileged; that it is not within the power of the attorney to waive said privilege, which belongs exclusively to the client; that petitioner did not interpret the rule of law referred to as pertaining to any correspondence that might have passed between him and officials of the Government, or between him, as attorney, or his clients, and any other persons, or to cover any other document save those which constituted communications between attorney and client relating to the subject matter of the attorney's employment.

11. Thereupon petitioner was sworn as a witness before said Committee and there were questions propounded to him and he made answers thereto as will appear by reference to pages numbered 5068 to 5079 of the aforesaid Exhibit D. Under examination by the Chairman and other

members of said Committee petitioner testified, in substance, among other things, to the names of airmail operators he had represented as an attorney; to the fact that he had never represented any one having an ocean mail contract; to the character of services rendered by him to his said clients, and to the character of the communications between himself and his said clients which he considered were privileged. He was thereupon asked by the Chairman of said Committee if he would telegraph to his clients on the subject of the Committee's subpœna for papers relating to their contracts, and, complying with the Committee's request in that regard, he prepared an identic telegram to each said client, submitted the same to the Chairman of said Committee, who gave his approval thereto, and sent the same, by telegram, on the said 31st day of January, 1934, to each and every client of his who at any time, so far as his knowledge extended, had any airmail contract or contracts. Each of said telegrams was as follows:

"I have today been subpœnaed to produce before the Black Committee all papers memorandums correspondence maps copies of telegrams relating to air and ocean mail contracts stop In so far as these involve confidential communications between us as attorney and client I have felt it my duty to assert and have asserted the privilege which the law places around such communications stop The privilege may be waived only by you as client stop The Committee has requested me to inquire whether you desire to waive this privilege and authorize me to make these documents available to the Committee investigators Please wire your decision.

WM. P. MacCRACKEN, JR."

12. Compliant to the command of said subpœna, and on January 31, 1934, petitioner, as promptly as practicable, produced and made available to said Committee all papers, of every kind and description, in his possession, power or control, in any way "relating to airmail and ocean mail contracts", excepting only those embraced within his clients' privilege hereinbefore referred to.

13. The foregoing telegram was sent to Goodyear Zeppelin Corporation; Kohler Aviation Corporation; Ludington Air Lines; New York, Rio & Buenos Ayres Air Line, Inc.;

Northwest Airways, Inc.; Pan American Airways; Pittsburgh Aviation Industries Corporation; South American Air Lines, Inc.; Transcontinental & Western Air, Inc.; Western Air Express.

14. On February 1, 1934, petitioner informed said Senate Committee that he had been advised by telegraph that Goodyear Zeppelin Corporation and Kohler Aviation Corporation waived the privilege attached to their communications between them and petitioner and on said date petitioner produced for said Committee all papers relating to airmail contracts of said corporations. On the 1st day of February, 1934, petitioner, not having heard from the other clients to whom the aforesaid telegram had been sent, addressed and sent to each of the following corporations, Ludington Air Lines; Northwest Airways, Inc.; Pan American Airways; Pittsburgh Aviation Industries Corporation; Transcontinental & Western Air, Inc.; and Western Air Express, the following identic- telegram:

"I have been requested to appear before Black Committee tomorrow at ten AM to advise them about replies to wire sent you regarding waiver of privilege.

WM. P. MacCRACKEN, Jr."

15. On February 2, 1934, petitioner was again called before said Senate Committee, under the said subpœna, *Exhibit C* hereto, and there testified, and there were there announced the opinions and the ruling, and were had the proceedings, all as fully appears in stenographic report of proceedings before said Committee on Friday, February 2, 1934, which report is attached hereto marked *Exhibit E* and made part hereof.

16. The aforesaid telegram sent by petitioner to
6 Northwest Airways, Inc., on January 31, 1934, was addressed to L. H. Brittin, 1090 National Press Building, Washington, District of Columbia. Petitioner was first employed as legal counsel by said Northwest Airways on or about March 10, 1933, and his said employment terminated November 30, 1933, since which date he has not been employed by, or had any connection with, said company. On information and belief petitioner avers that on February 1, 1934, the said Brittin called at the office of the law firm of which petitioner is a member, said firm consisting of Frederic P. Lee and petitioner, practicing under the

firm name of MacCracken and Lee; subsequent to the issue of said subpœna petitioner had not seen said Brittin nor had there been any communication between him and petitioner; said Brittin, petitioner is informed and believes and therefore avers, advised said Lee that he had received the above referred to telegram; that, as said Lee knew, he, Brittin, had on occasions during the summer of 1933 been permitted, as an accommodation, to use said Lee's office room, and that while there he had dictated and had typed some letters of an entirely personal nature, having no relation to airmail contracts, copies of which letters he had permitted to remain in the folder in said firm's files in which papers relating to the business of said Northwest Airways, Inc., were contained; that he desired to remove from said files said personal papers; the said Lee handed to said Brittin the folder referred to and in the presence of said Lee there were removed from said folder several papers, the number of which said Lee believes to have been not more than five or six, the contents of which papers the said Lee did not see and was not familiar with, which papers, as hereinbefore stated, said Brittin stated did not relate to airmail contracts but were exclusively personal to himself and his correspondents to whom the originals thereof had been addressed. Petitioner had no knowledge whatever of the matters hereinbefore referred to in this sixteenth paragraph (except the reference to the sending of the telegram and the period of employment) at the time of their occurrence nor at any time nor until after they had occurred nor did he ever have any knowledge of said Brittin's call at said firm's office until after it had occurred and said Brittin had left.

17. On petitioner's appearance before said Senate
7 Committee February 2, 1934, he testified with respect to the facts set forth in paragraph 16 hereof and he hereby refers to, and makes part of this seventeenth paragraph, his said testimony so given on said subject, and avers that the same truly states the facts to the best of petitioner's knowledge, information and belief.

18. On February 3, 1934, the said Brittin appeared as a witness before the said Senate Committee and testified regarding the matters referred to in the sixteenth paragraph hereof and petitioner attaches hereto and makes part

hereof, as *Exhibit F,* transcript of stenographic report of said Brittin's testimony before said Senate Committee.

19. On information and belief petitioner avers that the testimony of himself and of said Brittin, referred to in the aforesaid paragraphs 17 and 18 hereof, respectively, and contained in *Exhibits E and F* hereof, constitutes all the information, facts and evidence before the said Senate Committee and before the Senate of the United States in respect of the removal by said Brittin of any papers from files in the office of petitioner's firm when the Senate of the United States on February 5, 1934, took the action hereinafter referred to in paragraph numbered 31 hereof.

20. The aforesaid telegram sent by petitioner to Western Air Express, Inc., on January 31, 1934, was addressed to Harris M. Hanshue, President, Western Air Express, New York City. Petitioner had been employed as attorney by said Western Air Express from December 1, 1929, to September 1, 1932, and has at no time since the last mentioned date been employed by, or in any way connected with, said Western Air Express. On February 1, 1934, said Hanshue by telephone informed petitioner that before his Company could make its decision on the subject communicated to it by said telegram of January 31, 1934, he desired to have an opportunity to look over papers contained in petitioner's files relating to said Company's matters and also to examine certain personal papers, not relating to air mail contracts, copies of which he believed were contained in some of said files; said Hanshue stated that he was sending to petitioner's office for that purpose Mr. Gilbert Givven, known to petitioner as one-time secretary to said Hanshue and as Washington representative of the Western Air Express. Following said telephone message from said Hanshue, said Givven made an appointment to
8 call at petitioner's office and did so on the afternoon of February 1, 1934; and compliant to the request of said Hanshue, petitioner permitted said Givven to examine the file folders in the office of petitioner's firm and to take therefrom, for the purpose of delivering them to said Hanshue, certain papers not relating to airmail contracts. Since February 2, 1934, petitioner has learned that among the papers taken by said Givven from petitioner's office for delivery to said Hanshue there were some which did relate to the subject of airmail contracts; petitioner avers that he did not recognize, at the time of the occurrence herein

referred to, that the last referred to papers were among those taken by said Givven, he had no intention of delivering to said Givven or permitting him to take from petitioner's office any papers relating to airmail contracts, and to the best of petitioner's knowledge and belief the inclusion among the papers taken from petitioner's office by said Givven, in the circumstances herein related, of any which related to airmail contracts, was unintentional and inadvertent.

21. On petitioner's appearance before said Senate Committee February 2, 1934, he testified with respect to the facts set forth in paragraph 20 hereof and he hereby refers to, and makes part of this twenty-first paragraph, his said testimony so given on said subject, and avers that the same truly states the facts to the best of petitioner's then knowledge, information and belief.

22. Immediately following petitioner's appearance before said Committee on February 2, 1934, he communicated with said Western Air Express and requested the immediate return by it of all of the papers taken by Givven as aforesaid.

23. On February 3, 1934, the said Givven appeared as a witness before the said Senate Committee and petitioner avers, on information and belief, that the said Givven then and there produced, under subpœna from said Committee, each and every paper taken by him from petitioner's office on February 1, 1934, in the circumstances hereinbefore set forth; petitioner further avers, on information and belief, that on said February 3, 1934, each and every paper so taken from petitioner's office as aforesaid, by said Givven, was delivered by the latter to said Senate Committee and that all of said papers have been in the possession
9 of said Committee since February 3, 1934, and are now in its possession.

24. Immediately following his appearance as a witness before said Committee on February 2, 1934, petitioner used his best efforts to have each and every one of his clients, who were concerned in the subject matter, expedite the decision requested in his aforesaid telegram of January 31st and shortly prior to the service upon petitioner, on February 2nd, as hereinafter set forth, of a warrant issued pursuant to resolutions on that date adopted by the Senate, all of petitioner's clients who were concerned had

waived their above referred to privilege and consented to petitioner producing under the command of the said subpœna all papers in his possession relating to airmail contracts. Promptly upon receiving information of said waivers of the said privilege, petitioner notified the Chairman of said Committee thereof and made available to said Committee, under the command of its subpœna, all papers in his possession relating to airmail and ocean mail contracts.

25. On February 2, 1934, the said Senate Committee submitted to the Senate of the United States, in open session, a report, numbered 254, which said report is set forth on page 1875 of the Congressional Record of February 2, 1934, as shown by said page which is attached hereto, marked *Exhibit G*, and made part hereof.

26. On February 2, 1934, after the receipt of the aforesaid report, the Senate of the United States adopted a resolution, Senate Resolution 169, 73rd Congress, Second Session. A copy of said last mentioned resolution appears on page 1876 of the Congressional Record of February 2, 1934, and is attached hereto, marked *Exhibit H*, and made part hereof.

27. On February 2, 1934, the President of the Senate issued a warrant, directed to Chesley W. Jurney, Sergeant at Arms, United States Senate, under the command and authority of which the said Sergeant at Arms on said date took petitioner into custody. Copy of said warrant is attached hereto, as *Exhibit I*, and made part hereof. As the Senate had adjourned when said warrant was served upon petitioner by the said Sergeant at Arms on February 2nd, petitioner was parolled in the custody of his counsel to appear at the bar of the Senate, in the custody of its Sergeant at Arms, at noon, February 5, 1934.

28. On February 5, 1934, petitioner and his counsel appeared in the office of the Sergeant at Arms of the Senate, petitioner being then and there ready to appear at the bar of the Senate in response to said warrant, to produce there all papers included within the aforesaid subpœna, and to answer such questions pertinent to the matter under inquiry as the Senate might propound. Petitioner was not taken before the bar of the Senate. Without being so taken, or without being required, or given an opportunity, to appear at the bar of the Senate, petitioner was by resolution, unanimously adopted by the Senate ordered to be released

from custody under Senate Resolution 169 and under the aforesaid warrant issued and served on February 2nd. And petitioner was then and there on February 5, 1934, released from said custody.

29. Prior to February 5, 1934, petitioner had produced and delivered to the Senate of the United States, under the command of the aforesaid Senate Committee subpœna of January 31, 1934, and the aforesaid Senate warrant of February 2, 1934, to the best of his ability, knowledge and belief, every paper of every kind and description in his possession, or under his control, relating in any way to air-mail and ocean mail contracts; on February 5, 1934, by order adopted by the Senate, all of said papers were turned over and delivered to the said Senate Committee and since that date they have been, and they now are, in the possession of said Committee.

30. As hereinbefore alleged, petitioner appeared as a witness, under said subpœna, before said Senate Committee on January 31, 1934, and answered all questions then and there propounded to him; he was at the Senate, in the custody of its Sergeant at Arms, on February 5th, and was then and there ready and willing to answer any question pertinent to its inquiry which might have been propounded to him; he has never been discharged from the obligation to appear again before said Senate Committee, in response to its said subpœna, and he stands ready, upon being notified so to do, to appear before said Committee at any time, and to answer all pertinent and material questions which may be propounded to him.

31. On February 5, 1934, the Senate adopted Sen-
11 ate Resolution 172, 73rd Congress, Second Session, copy of which resolution appears on page 1943 of the Congressional Record of said date, which is attached hereto, marked *Exhibit J*, and made part hereof.

32. On February 6, 1934, there was delivered to petitioner by Chesley W. Jurney, Sergeant at Arms of the Senate, a paper addressed by the President of the Senate to the Sergeant at Arms, commanding him to forthwith summon petitioner, and others named, to appear at the bar of the Senate in pursuance to the aforesaid Senate Resolution 172. Said paper is referred to therein as a "citation". Copy of said citation is attached hereto, marked *Exhibit K*, and made part hereof. Petitioner was not taken into cus-

tody by the Sergeant at Arms under the alleged authority of said citation but was cited thereby to appear before the bar of the Senate on Friday, February 9, 1934, at 12 o'clock noon, to show cause why he should not be punished for contempt on account of the destruction and removal of certain papers, files and memoranda alleged to be covered by the aforesaid Senate subpœna of January 31st.

33. On February 8, 1934, the Senate adopted a mode of procedure for the trial of petitioner at its bar, as will fully and at large appear by reference to pages of the Congressional Record of February 8, 1934, attached hereto, marked *Exhibit L*, and made part hereof.

34. February 9, 1934, petitioner addressed to the Senate of the United States a communication copy of which is attached hereto, marked *Exhibit M*, and made part hereof.

35. On February 9, 1934, the Senate under resolution on that day adopted by that honorable body issued to its said Sergeant at Arms an order or warrant as hereinbefore alleged, copy of said warrant being Exhibit A hereto. Said warrant was on February 9, 1934, signed by the President of the Senate and delivered to said Chesley W. Jurney, its Sergeant at Arms, and thereupon, on February 12, 1934, said Sergeant at Arms, Chesley W. Jurney, acting under the pretended authority of said warrant, arrested and detained and now restrains this petitioner of his liberty.

36. Petitioner avers that the Senate of the United States is without lawful authority to punish as a contempt
12 or as a breach of its privileges any of the acts of petitioner hereinbefore referred to; and petitioner further avers that there are no other acts of petitioner for which the Senate asserts the right to try and punish him and/or for which the last mentioned warrant of the Senate directed him to be arrested; petitioner further avers that the arrest and detention of petitioner is without due process of law and in violation of his constitutional rights.

Wherefore, your petitioner prays that a writ of habeas corpus issue, directed to the said Chesley W. Jurney, or to such other person or persons as then may have your petitioner in custody, commanding him or them to bring the body of your petitioner before this Court forthwith, and to show cause, if any he has or they have, for his detention; and that your petitioner be discharged from the unlawful

restraint and imprisonment by the aforesaid Chesley W. Jurney and any other person or persons acting under the pretended authority of the aforesaid Senate warrant; and that your petitioner may have such other and further relief as the nature of the premises may require.

WILLIAM P. MacCRACKEN, JR.,
Petitioner.

FRANK J. HOGAN,
EDWARD L. JONES,
Attorneys for Petitioner.

13 DISTRICT OF COLUMBIA, *ss:*

I, William P. MacCracken, Jr., being first duly sworn, on oath depose and say that I have read the foregoing petition by me subscribed, and know the contents thereof, and that the matters and things stated therein upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

WILLIAM P. MacCRACKEN, JR.

Subscribed and sworn to before me this 12th day of February, 1934.

FRANK E. CUNNINGHAM,
Clerk.

By HARRY M. HULL,
Ass't Clerk.

Fiat.

Let the writ of habeas corpus issue as prayed herein, returnable before me forthwith.

By the Court, this 12th day of February, 1934, at 2:00 p. m.

DANIEL W. O'DONOGHUE,
Justice.

14 EXHIBIT A.

United States Senate.

Washington, D. C., February 9, 1934.

To Chesley W. Jurney,
Sergeant at Arms,
United States Senate.

The undersigned, the President of the Senate, by virtue of the power vested in me, hereby command you to forth-

with arrest and take into custody and bring to the Bar of the Senate, William P. MacCracken, Jr., in pursuance of the following order of the Senate, this day agreed to:

"Ordered, that an order for the immediate arrest of William P. MacCracken, Jr. be ordered by the United States Senate, directing the Sergeant at Arms of the Senate to take into custody immediately the body of William P. MacCracken, Jr. and bring him forthwith before the Senate, to show cause, if any he has, why he should not be punished for contempt of the Senate for the matters and things as shown by the reports of the special Senate Committee on Ocean and Air Mail contracts, and as directed in the citation previously served upon William P. MacCracken, Jr. by the Sergeant at Arms of the Senate."

Hereof fail not and make due return of this warrant.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of the United States Senate, this 9th day of February, 1934.

(Signed) JNO. N. GARNER,
President of the Senate.

Attest:
(Signed) EDWIN A. HALSEY,
Secretary of the Senate.

15 EXHIBIT B.

72d Congress, 2d Session.

Senate Resolution 349.

Resolution.

Resolved, that a special committee of the Senate, to be appointed by the President of the Senate after March 4, 1933, three from the majority political party and two from the minority political party, is authorized and directed to investigate and make a full, complete, and detailed inquiry into all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail, both foreign and domestic, with a view to determining particularly (1) all the circumstances surrounding the execution and continuation of, and the necessity, if any, of maintain-

ing, altering, or canceling such contracts; (2) the organization and financial condition of the associations, partnerships, or corporations with which such contracts have been entered into, including a study of their capital stock, authorized and paid in, their receipts and expenditures, their total outlay in salaries paid to officers, executives, and employees, whether by way of bonus or otherwise, and their relationship, whether by interlocking directorates or otherwise, with any other individual, association, public official, partnership, or corporation, commercial or banking; (3) the extent of any activities by or on behalf of any association, partnership, or corporation with which such contracts have been entered into, in any effort to obtain, through legislation or otherwise, cash subsidies from the United States; and (4) any other facts relating to legislation or appropriations affecting air mail and ocean mail contracts, both foreign and domestic. The committee shall report to the Senate, as soon as practicable, the results of its investigations, together with its recommendations.

16 EXHIBIT C.

United States of America.

Congress of the United States.

To William P. MacCracken, Jr., 1152 National Press Building, Washington, D. C., Greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the Senate Committee on Ocean mail and air mail contracts of the Senate of the United States, on instanter, 193-, at 12 o'clock 30 m., at their Committee Room, 101 Senate Office Bldg. then and there to testify what you may know relative to the subject matters under consideration by said Committee.

Bring all books of account, bank pass books, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air mail and ocean mail contracts.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To J. A. Bradley, L. F. Rittelmeyer to serve and return. Given under my hand, by order of the Committee, this

31st day of January, in the year of our Lord one thousand nine hundred and -4.

HUGO L. BLACK,
Chairman, Committee on ——.

17 EXHIBIT D.

Now, I understood that a witness who had been summoned who desires to make a statement to the Committee in reference to the summons.

Mr. MacCracken, I understood that there was some question that you desired to present to the Committee?

18 Mr. MacCracken: Yes, Senator.

The Chairman: Suppose you just go ahead and state what it is?

Statement of Mr. William P. MacCracken, Jr.

Mr. MacCracken: Mr. Chairman and members of the Committee, I am here in response to a subpœna which was served upon me this noon asking me, in addition to being present, to bring all books of accounts, passbooks, canceled checks, checkstubs, deposit slips, papers, memorandums, correspondence, maps, and copies of telegrams relating to air mail and ocean mail contracts.

The gentlemen who served the subpœna were informed by me that I was a member of the legal profession; that I would be very glad to furnish them with any matters which pertained to me personally, or to my firm, which is composed of myself and Frederic P. Lee, formerly legislative counsel of the Senate; that I would also be glad to furnish them with any papers or documents, such as called for in the subpœna, as did not relate to confidential communications between attorney and client, but that as I understand the law, communications, whether oral or written, between attorney and client, are privileged, and it is not within the purview of the attorney to waive the privilege and that, therefore, I would have to go through the files to determine what correspondence was and what was

19 not within the privilege.

I assured them, however, that my interpretation of that did not pertain to any correspondence that might have passed between our office and officials of the Government, either administrative or legislative.

Now, I can assure you gentlemen, that both on my professional honor and the honor of my partner, Mr. Lee, who I think is known to some or most of you, that anything we withhold under that understanding will be only withheld after it has gotten the joint judgment of my partner and myself.

It was suggested that the determination of that question should be left to the investigators to this committee, and I regret to inform you that if it should be your judgment—and I hope it will not, but it seemed to be theirs—we cannot accept that. The attorney can not shift the responsibility of determining what is or what is not confidential communications between himself and anyone else. I think that is about the situation, Senator.

I would like, perhaps, before closing, to say that it is my desire to cooperate to the fullest extent in furnishing any information which I think I may properly do, without violating the ethics and the law which governs the legal profession. It is not only the matter of the canons of ethics, but as I understand the rule, it is one laid down by common law which makes an attorney who does violate that confidence liable in damages to anyone who accuses him of wrongfully violating it and in some cases he has even been held guilty of slander or libel, if it was written, as the case may be.

The Chairman: The summons was served to bring those matters up here, and it is your insistence, as I gather it—and I want to be absolutely sure of it before the Committee takes it up—it is your insistence that the privilege extends to the point where the correspondence could not be brought here by subpœna if, in your judgment, it was confidential?

Mr. MacCracken: That is my understanding of the law, Senator, that it is not available for a court subpœna or any subpœna at all.

Senator King: But it must be correspondence exclusively between the attorney and client?

Mr. MacCracken: As I understand it.

Senator Austin: Relating to his employment?

Mr. MacCracken: Relating to the subject of his retainer.

The Chairman: As I understood from a brief statement made to me by Mr. Patterson, the question arose from cir-

cumstances like these—and I want to be sure we understand them fully——

Mr. MacCracken: Yes, sir.

The Chairman: The investigator asked for the correspondence and stated that it would not be necessary
21 to bring it if you would permit them to go over it. Is that correct?

Mr. MacCracken: He wanted to go through all the files in the law office regardless of what they pertained to. That was the first request. They wanted to go through all files and then he said, "We will limit it only so far as it pertains to air mail and ocean mail contracts."

The Chairman: May I ask if later there was an understanding that you would turn over to them such part as did not relate to letters directly between you and your client?

Mr. MacCracken: That is correct, sir.

The Chairman: And then the question arose, by reason of the fact that you were to decide when a paper was reached whether they should see it or whether they should not?

Mr. MacCracken: Yes, sir.

The Chairman: And it is on that issue that you and they disagreed?

Mr. MacCracken: That is my understanding of it, sir.

The Chairman: And in so far as your permitting them to see those things which you selected as not being confidential, that was all right?

Mr. MacCracken: Yes, sir.

The Chairman: And the sole issue is whether or not you should determine the privileged nature of the correspondence?

Mr. MacCracken: That is correct, sir.

Senator King: Only as between yourself and your clients?

22 Mr. MacCracken: No, sir; only between myself and my clients.

Senator King: And relating exclusively to the controversial matter?

Mr. MacCracken: Yes, sir, and I am glad to assure the committee that any communication between myself and members of either the administrative branch of the Government or the executive branch or legislative branch—

there have been none as far as I know with any member of the judicial branch—will be made available.

The Chairman: As I understand it, that is a privilege which the client can waive, is it not?

Mr. MacCracken: That is my understanding of it.

The Chairman: May I ask whether you have endeavored to ascertain from them whether or not they would waive it?

Mr. MacCracken: No, sir; I have not had any opportunity. This came up about 12 o'clock today when they came into my office. The subpœna was returnable at 12:30 and I think I accepted service at 12:20.

The Chairman: Then, as I understand it, the sole issue is that when a file was taken out, you would select those letters that you believed to be privileged and they would not be permitted to see them and they insisted on seeing all of the letters in that file?

23 Mr. MacCracken: Of course we were working very rapidly, I went through it and things clearly not privileged, I gave them the right of way. When I felt there was any doubt about it, I felt in the first instance I should resolve the doubt in favor of my client, but I told the investigators I wanted to go through the files again to make sure that I had not withheld anything that in my opinion, and in the opinion of my partner, we might both agree were not confidential, and if we did not agree they were confidential, we would turn them over to your investigator.

It was my purpose to go through those files I have gone through with them over again. Going through hastily, we want to be perfectly frank to the Committee and say that we may have refused to show some things which upon later examination we will be willing to show, but you must remember that if you violate the confidence, there is no way of repairing it and therefore the first doubts were resolved that way. For that reason, perhaps, the investigators got the impression I was holding out a great deal of material from them. I think in the long run, they will get the bulk of it, but if a mistake is made, as I say, there is no way of correcting it.

Senator White: I understood you to state that you did not include within the privileged class of communication

any letters or other forms of communication that had
24 passed between you and any Government official.

Mr. MacCracken: That is correct sir. I thought that was what they were most interested in and that is what I wanted to assure them they would get.

The Chairman: The Committee has not had this exact question up before. We have had the question of lawyers' privilege——

Senator King: I move we take a recess for 15 minutes and consider this matter.

(Whereupon the Committee retired to consider the question in executive session.)

The Chairman: The Committee will be in session. Mr. MacCracken, will you please be sworn?

Testimony of William P. MacCracken, Jr.

(The witness was duly sworn by the Chairman.)

The Chairman: Mr. MacCracken, may I ask you what air mail and ocean mail operators you have represented as a lawyer?

Mr. MacCracken: May I answer the last part of the question first, because it is simpler?

The Chairman: Yes.

Mr. MacCracken: I have never represented an ocean mail operator in the sense of operating by steamboats. I have represented operators that have flown over large bodies of water by aircraft.

25 Others that have air mail contracts——

The Chairman: Have had or sought to obtain air mail contracts?

Mr. MacCracken: I represented the Goodyear Zeppelin Corporation, which sought to get legislation——

The Chairman: May I ask you there if you represented them in the effort to have legislation passed?

Mr. MacCracken: I represented them in the drafting of legislation and in the hearings before the Committees and matters of that character.

The Chairman: That was the only legal representation you had for the Goodyear Zeppelin people?

Mr. MacCracken: Yes, sir. I have done some work for the Goodyear Tire and Rubber Company.

The Chairman: In reference to the Goodyear Zeppelin Company, in representing them in an effort to obtain legislation, do you claim that that representation is privilege?

Mr. MacCracken: No, sir, but communications between attorney and client are privileged.

The Chairman: You do claim privilege from divulging the correspondence between you and the Goodyear Zeppelin people at this time?

Mr. MacCracken: As I say, as far as it might be considered confidential, and that is a matter which I would have to——

The Chairman: What I want to get at is, do you
26 claim now the privilege in reference to the Goodyear Zeppelin Company that you have asserted in connection with correspondence passing between you and them with reference to their representation to aid them in securing legislation?

Mr. MacCracken: I would say in answer to that, Senator, if any of it, I felt were confidential, I would have to claim the privilege.

The Chairman: You do claim privilege——

Mr. MacCracken: In so far as it is confidential.

The Chairman: What would you consider confidential?

Mr. MacCracken: Well, a hypothetical case—let me put this as a hypothetical case, and I think perhaps you will agree with me: Suppose that they had asked my opinion as to the constitutionality of a certain provision that was proposed to be incorporated into the bill. I would say that, without a waiver from the client, that that opinion was confidential and that the facts they submitted to me upon which I based the opinion, I would not be at liberty to disclose. I do not think there was such a case. I am merely trying to cite something without disclosing the confidences——

Senator White: In effect, you claim to have the right to determine whether a particular communication is or is not of a privileged class?

Mr. MacCracken: May I answer that by stating it a little differently, Senator? I claim that I am under the
27 duty to do it—not that I have the right. I am not asserting any right.

Senator White: I accept the correction.

Mr. MacCracken: I feel that I am under a solemn duty.

Senator White: You assert the privilege?

Mr. MacCracken: Yes, sir.

The Chairman: That is the Goodyear Zeppelin?

Mr. MacCracken: Yes, sir, that is right.

The Chairman: And you do assert that privilege as to the correspondence?

Mr. MacCracken: If there is any. I have put some aside as under some doubt.

The Chairman: What is the next company you have represented?

Mr. MacCracken: The Western Air Express.

The Chairman: Were you employed to represent them in connection with obtaining a contract or in connection with legislation?

Mr. MacCracken: My original employment with the Western Air Express, Senator, dates back to 1925, when they got their first air mail contract, and I was retained at that time in connection with the preparation of their bid before the Post Office Department, and the objections which we filed to other bids at that time, as I recall.

28 The Chairman: Your representation of them then has been in connection with obtaining air mail contracts?

Mr. MacCracken: Yes, sir.

The Chairman: And as to the correspondence that passed between you and them you assert the privilege?

Mr. MacCracken: I say that I feel that I am under the duty. That is correct.

The Chairman: What is the next one you have represented?

Mr. MacCracken: Pan American Airways.

The Chairman: Have you represented them in connection with obtaining air mail contracts?

Mr. MacCracken: Yes, sir.

The Chairman: Have you represented them in connection with any other transactions with the Government besides obtaining air mail contracts?

Mr. MacCracken: Yes, sir.

The Chairman: In what other lines?

Mr. MacCracken: I have represented them before the Federal Radio Commission. We handle all their radio applications. We have represented them before the War Department; we have represented them before the Navy Department; we have taken up in their behalf——

The Chairman: Have you represented them in connection with the passage of legislation?

29 Mr. MacCracken: Yes, sir—that is, in an attempt to get legislation passed, but not with its passage.

The Chairman: Now, with reference to your representation of the Pan American Airways, do you also assert the privilege with reference to correspondence?

Mr. MacCracken: I believe that duty is on me.

The Chairman: Have you represented the Pan American Grace Company?

Mr. MacCracken: Only, I think, in connection with their applications before the Federal Radio Commission. They may have been—not in connection with getting of contracts. I never represented Pan American Grace in connection with getting of contracts.

The Chairman: What other companies have you represented in connection with the obtaining of contracts?

Mr. MacCracken: In connection with the obtaining of contracts?

The Chairman: Or modifications of contracts?

Mr. MacCracken: Well, the Kohler Aviation.

The Chairman: Did you represent them solely and exclusively in connection with obtaining air mail contracts?

Mr. MacCracken: No, sir, not solely and exclusively. I did other things for them.

The Chairman: Any transactions with the Government?

Mr. MacCracken: Well, some were with the Government and some with other parties. I think that applies

30 also to Western Air Express; in fact, I know it does.

The Chairman: Have you represented them in connection with any legislation?

Mr. MacCracken: No, sir.

The Chairman: Now, as I understand it, with reference to your correspondence and memorandums, etc., passing between you and the Kohler Aviation, you likewise claim the privilege of an attorney in that connection?

Mr. MacCracken: Yes, sir.

The Chairman: And what other companies have you represented?

Mr. MacCracken: Well, one of the companies which did not get an air mail contract was the Ludington Lines. I represented the Ludington Air Lines on two different occasions.

The Chairman: Was that in an effort to obtain contracts?

Mr. MacCracken: Yes, that was the principal part of the representation. There may have been other things I did for them.

The Chairman: With reference to the Ludington Lines, do you also assert privilege with respect to that correspondence?

Mr. MacCracken: Yes, sir.

The Chairman: What other lines have you represented?

31 Mr. MacCracken: The Transcontinental and Western Air?

The Chairman: The Transcontinental and Western Air?

Mr. MacCracken: Yes, sir.

The Chairman: Was that in connection with obtaining the contract from the Government for air mail?

Mr. MacCracken: Yes, sir.

The Chairman: And do you likewise claim a privilege with reference to the Transcontinental and Western Air?

Mr. MacCracken: Yes, sir.

The Chairman: What other companies have you represented?

Mr. MacCracken: I represented Mr. Richard W. Robbins, individually, or at least I was retained by Mr. Richard W. Robbins, personally—I had better put it that way—to do some work on behalf of a company in which he was then interested.

The Chairman: Was that the Pittsburgh Aviation Industires, Inc.?

Mr. MacCracken: Yes, sir, I was not employed by the company but by Mr. Robbins personally, as I understand by the retainer. That lasted just a year.

The Chairman: Did you represent them in connection with the buying out of Mr. Ball and in connection with the obtaining of contracts?

Mr. MacCracken: I represented them in connec-

32 tion with buying out Mr. Ball—in buying the interest they bought of Mr. Ball.

The Chairman: Did you represent them in their efforts to obtain a mail contract between Pittsburgh and Norfolk?

Mr. MacCracken: No, sir—yes, I think that is correct. I do not think they made any particular efforts between the latter part of October, 1930, when they closed the deal. The deal with Mr. Ball was closed early in November.

The Chairman: You claim a privilege also in reference to that correspondence?

Mr. MacCracken: Yes, sir.

The Chairman: What other companies have you represented?

Mr. MacCracken: I did some work for Northwest Airways during the year just passed. That was where they wanted some opinions. I rendered some opinions for them. I do not think I ever handled any of their negotiations with the Post Office Department.

The Chairman: Do you assert a privilege in connection with that representation?

Mr. MacCracken: Yes, sir.

The Chairman: In connection with correspondence, I mean?

Mr. MacCracken: Yes, sir.

33 The Chairman: What others have you represented?

Mr. MacCracken: Going back to 1925, I represented Colonial Air Transport, at the time that they got their original contract between New York and Boston, and I represented the National Air Transport——

The Chairman: In 1925?

Mr. MacCracken: Yes, sir, 1925.

The Chairman: Are you sure about that date?

Mr. MacCracken: Yes, sir, absolutely. It was the fall of 1925, that the contract was awarded. The service was started in 1926, but I am quite positive the bids were opened in September, 1925.

The Chairman: When did you leave the Commerce Department?

Mr. MacCracken: I went with the Department of Commerce in August of 1926. I had represented the Western Air, National Air Transport and Colonial Air Transport before going with the Department of Commerce, and my representation of Western Air and Colonial Air Transport had terminated some months prior to my going with the Department. I mean when they got the contracts, that was the end of that representation as I recall it. It is pretty far back, but that is as I recall it.

The National Air Transport, I assisted in the organization of the company and represented them up to the 1st of August, 1926. I was sworn in as Assistant Secretary of

Commerce, I think, about the 11th or 12th of August,
34 1926. I knew about the 1st of August, I was to be sworn in. I terminated my employment then and have not represented them at any time since.

The Chairman: Are there any others that you represented? What about the New York and Buenos Aires?

Mr. MacCracken: That was an effort to get a contract. I was chairman of the Board of the New York and Buenos Aires Company, and also acted in a legal capacity for them.

The Chairman: Do you claim a privilege for that correspondence?

Mr. MacCracken: Yes, sir.

The Chairman: Are there any others?

Mr. MacCracken: I do not recall any others at the moment. There may have been some others that I did some minor things for. I will be glad to furnish you a complete list. There is no desire to hold back.

The Chairman: As I understand it, you are asserting the privilege because of the fact, as you feel you owe it to your clients not to divulge these confidential communications?

Mr. MacCracken: Yes, sir.

The Chairman: Would you have any objection to wiring each of them and requesting that they release you so that the Committee will have access to those papers?

Mr. MacCracken: I do not think I should request them to do it. I should be glad to wire them that the Committee had raised the question, and ask them what action
35 they want me to take.

The Chairman: And you will wire each one and ask them whether or not they object to your turning over the correspondence to the Committee and if they do not object you will turn over the correspondence to the Committee?

Mr. MacCracken: Suppose we leave it this way: May I draft a wire which I think should be sent out and submitted to the Committee? I would like to send out a wire that will meet with the desires of the Committee.

The Chairman: Suppose you do that now?

Mr. MacCracken: I will be glad to.

(After a pause.)

The Chairman: The Committee is going to leave and I am going to stay here and look at the telegram.

Senator King: Prepare one, taking your time, and submit it to the Chairman.

The Chairman: The Committee will adjourn until tomorrow morning at ten o'clock.

(Whereupon at 5.40 o'clock, the hearing was adjourned until tomorrow, Thursday, February 1st, 1934, at ten o'clock A. M.)

36 EXHIBIT E.

Investigation of Air Mail and Ocean Mail Contracts.

Friday, February 2, 1934.

Special Committee on Investigation of Air Mail and Ocean Mail Contracts.

The Committee met, pursuant to adjournment, at 10:30 o'clock a. m., in Room 318, Senate Office Building, Washington, D. C., Senator Hugo Black (Chairman) presiding.

Present: Senators Black (Chairman), McCarran, King and White.

Also present: Mr. A. G. Patterson, Special Investigator for the Committee.

Proceedings.

The Chairman: Mr. MacCracken, will you please take the stand?

Testimony of William P. MacCracken.

(The witness had been previously sworn by the Chairman.)

The Chairman: Mr. MacCracken, may I ask you to place in the record the telegram that you sent to the various companies?

Mr. MacCracken: Yes, sir.

Senator White: May we hear it read?

37 The Chairman: Yes.

Mr. MacCracken: This was a night letter which was sent out January 31, 1934—that was day before yesterday, the day I appeared before the Committee:

"I have today been subpœnaed to produce before the Black Committee all papers, memoranda, correspondence,

maps, copies of telegrams relating to air and ocean mail contracts stop In so far as these involve confidential communications between us as attorney and client I have felt it my duty to assert and I have asserted the privilege which the law places around such communications stop The privilege may be waived only by you as client stop The Committee has requested me to inquire whether you desire to waive this privilege and authorize me to make these documents available to the Committee investigators stop Please wire your decision.

"(Signed) WILLIAM P. MACCRACKEN, JR."

That was sent to Horace M. Hanshue, President, Western Air Express, 1775 Broadway, New York City; Richard W. Robbins, President, Transcontinental & Western Air, 1775 Broadway, New York City; Goodyear-Zeppelin Corporation, attention Mr. Hartham, Akron, Ohio; Mr. Richard W. Robbins and Pittsburgh Aviation Industry Corporation, 1775 Broadway, New York City; Mr. J. T. Tripp, President, Pan American Airways, Chrysler Building, New York City; C. T. Ludington, care Ludington Air Lines, Atlantic Building, Philadelphia, Pennsylvania; Mr.
38 J. B. Kohler, Kohler Aviation Corporation, Municipal Air Port, Grand Rapids, Michigan; Colonel L. H. Brittin, Northwest Airways, 1090 National Press Building, Washington, D. C.

Then I sent a similar telegram on yesterday as a day letter to Mr. Fremont C. Peck, President, South American Line, Inc., formerly New York, Bahia & Buenos Aires, Inc., 100 West Fifth Street, Wilmington, Delaware.

May I explain the reason for the delay in sending that wire? That was due to the fact that this company has been or is in the process of being liquidated, and I had a little difficulty in finding a name and address for it, and did not get it until yesterday, and then sent it as a day letter instead of sending a night letter the day before.

I also sent yesterday, at the suggestion of Mr. Robbins, a wire to Mr. Hann, who is President of Pittsburgh Aviation Industries Corporation in Pittsburgh. That does not appear on these telegrams, but I know if he asked me if I would send one there, as he is not actively connected with the company. You will recall this was originally with Mr. Robbins. He advised me before the year was up, the last two or three months of it were taken over by the corpora-

tion itself, and the personal relation did not continue throughout the full year. It was for only one year.

Then last night, after I heard from Mr. Patterson,
39 I sent a day letter to the same people mentioned, with the exception of Mr. Peck, from whom I had not had time really to hear. The day letter is as follows:

"I have been requested to appear before Black Committee tomorrow morning at 10 a. m. and advise them about reply to telegram sent you regarding waiver of privilege.

"(Signed) WILLIAM P. MacCRACKEN, JR."

I think of course very few of them got it last night, because I did not hear from Mr. Patterson until 10 minutes to 6. It took us about 20 minutes to get the telegram filed, but I figured a day letter rush would get there as quickly as a straight wire, and if they did not get them last night they will get them this morning. I assume the Committee would also like to have in the record the copies of replies I received?

The Chairman: Yes:

Mr. MacCracken: I received the following reply from Kohler Aviation Corporation signed, J. B. Kohler:

"This telegram is your authority to disclose to Black Committee any confidential communications or other papers held by you as our attorney relating to air mail matters stop Confirming by letter.

"(Signed) KOHLER AVIATION CORPORATION,
"J. B. KOHLER."

I might state also, if I may, that the investigators for the Committee worked practically all day yesterday
40 on these files and I had an appointment to meet them this morning and continue with them, but the Committee's request took precedence over that.

I also received the following day letter from Akron, Ohio, addressed to me at the National Press Building:

41 "We authorize you to make documents as to relations between us as your clients and you as our attorney available to Black Committee.

"F. M. HARPHAM,
"Vice President,"
"GOODYEAR ZEPPELIN CORP."

I also received this telegram at the hotel last night from Ardmore, Pennsylvania:

"Wire received. Will advise you not later than tomorrow night.

"(Signed) C. T. LUDINGTON."

Those are all the telegrams that I have. I had a telephone call this morning from Mr. Thatch, general counsel of Pan-American Airways, in which he stated that I would be furnished with authorization to make their files available to the Committee investigators.

Senator White: Who was that—Pan-American?

Mr. MacCracken: Pan-American, Mr. Robert Thatch, their general counsel.

The Chairman: You had no other replies?

Mr. MacCracken: I have had some telephone calls, Senator, in which the clients indicated that they would take counsel in regard to the matter and would let me hear from them promptly.

The Chairman: What clients were those?

Mr. MacCracken: I had a call from Mr. Hanshue, of Western Air Express, and Mr. Robbins, of T. & W. A. I think that is all. That very nearly completes the list, I believe. I have not heard anything from Mr. Peck,
42 of the old New York, Rio and Buenos Aires, but I feel that I have not had time for that.

The Chairman: Have you heard from the Northwest Airways?

Mr. MacCracken: No, sir.

The Chairman: Mr. Brittin is in the city, is he not?

Mr. MacCracken: I believe that he is.

The Chairman: Do you still decline to permit the Committee to have access to the correspondence, or to bring the correspondence to the Committee, in response to the subpœna?

Senator King: You mean as to all of those that he has not had waivers?

The Chairman: As to all or any.

Mr. MacCracken: Of course, as to those where I have had waivers, I am making these filed available. As to the others, my suggestion would be, if I may make a suggestion, that I be given a little further time in which to reply.

The Chairman: Do you still take the position that you decline to turn them over without their consent?

Mr. MacCracken: I feel that that is my duty, in so far as they are confidential. Of course this subpœna is what we would call a blanket subpœna. It is difficult to determine. There is no specific letter, or specific paper, or document called for in it. Therefore, the question of whether or not what the Committee desires would fall within the rule with reference to confidential communications.

43 It is almost impossible to determine, but in so far as it would fall within that category, I am still of the same opinion as to the duty which the law imposes upon me. Of course, I want it very clearly understood that I am making, that I will make available, and be very glad to, all of the files which I have which do not come within that category—and have from the first, before I came up here.

The Chairman: The files that are in your office are in exactly the same condition as when the subpœna was served, are they not? There have been none removed and none taken away?

Mr. MacCracken: As far as they relate to ocean and air mail contracts, that is correct.

The Chairman: Have any of them been removed?

Mr. MacCracken: You mean any files from the office?

The Chairman: Yes.

Mr. MacCracken: Yes, sir.

The Chairman: With reference to what?

Mr. MacCracken: With reference to matters that did not pertain to air mail and ocean mail contracts. What happened was this, as I understand it. Some of the clients at times have used our offices as their personal office, as it were. That is, they have come in and dictated personal letters to the stenographers, which I never saw, don't know anything about, don't know the subject of them. Those were not part of our files.

The Chairman: Who has removed them?

44 Mr. MacCracken: I understand—I didn't see him, but by partner, Mr. Lee, told me that Colonel Brittin had come and asked for some such correspondence, and some such correspondence was given to Mr. Givin.

The Chairman: Who is Mr. Givin?

Mr. MacCracken: He is Mr. Hanshue's secretary.

The Chairman: Of the Transcontinental Air Express?

Mr. MacCracken: Western Air Express.

The Chairman: Did you permit those to be moved?

Mr. MacCracken: Yes, sir. I thought that that was proper.

Senator McCarran: After the subpœna was served?

Mr. MacCracken: Yes, sir.

The Chairman: When were they removed?

Mr. MacCracken: They were removed yesterday.

The Chairman: Have any others been removed?

Mr. MacCracken: No, sir.

The Chairman: Were you there when they were removed?

Mr. MacCracken: I was there when Mr. Givin took the correspondence of Mr. Hanshue's. I was not in the room—I may have been in the office, I am not sure, but I did not see Colonel Brittin. All I know is that Mr. Lee told me, when he went over the file with him, he allowed him to take correspondence which was clearly that which had been dictated by Colonel Brittin to the stenographers, and with which neither he nor I had anything to do.

45 The Chairman: They were in your files, were they not?

Mr. MacCracken: Yes, sir; but they were the property of our clients.

The Chairman: And Colonel Brittin is one of the gentlemen who has made no statement to you of any kind whatever?

Mr. MacCracken: I asked Mr. Lee, when he told me about it afterwards, if Colonel Brittin had said what we should do with the official files, and he said no, that he had not. I personally have not talked to Colonel Brittin.

The Chairman: And you are sure that no other files of any kind have been taken away from the office and that they are all still there that were in your office at the time the subpœna was served on you?

Mr. MacCracken: To the best of my knowledge and belief, yes, sir.

The Chairman: There have been no letters removed except those?

Mr. MacCracken: Not to my knowledge.

The Chairman: Except those?

Mr. MacCracken: Except those.

The Chairman: I think the Committee should make a decision as to what it should do.

Senator King: Mr. Chairman, speaking for myself, I do not think that Colonel MacCracken is entitled to claim privilege with respect to any of the correspondence
46 between himself and his clients. This is not a proceeding in a court of law. It is an investigation carried on by a Committee of the Senate.

The rules of evidence which prevail in law may or may not apply, they may not be invoked by a witness to the same extent and to the same purpose that he could invoke those rules in a court of law.

The question of privilege does not extend to confidential communications between an attorney and his clients in a legislative investigation, and it would be for the Committee, after examining the records, to determine whether they are pertinent or material.

47 If the Committee believes the records to be pertinent to the inquiry and do shed light upon the transactions which are being investigated, then the Committee would have the right, notwithstanding the claim of privilege, to have those records made a part of the proceedings of the Committee.

However, the fact that they may be subpœnaed and brought into the Committee room does not meet that all of them are to go into the record. I think the witness would have the right then to contend that the correspondence or memoranda were not pertinent or germane or relevant to the inquiry. And if that were true, the objection to their admission might be properly interposed, but not upon the ground of privilege, but upon the ground that they are not pertinent to the inquiry. In other words, the rule of privilege, as I understand it, does not apply in legislative investigations.

I think that Hinds' Precedents establishes that rule, or rather, it supports that view. This appears in Hinds' Precedents. It is a quotation from Dimock, Congressional Investigating Committee, and it states the situation with reference to the applicability of court rules of evidence to investigations as it exists at the present time:

"Personal Guarantees—Questions of personal guarantees, as we shall discover, are in many cases inextricably

bound up with problems of committee procedure.
48 To begin with, it may be stated as a general proposition that the constitutional guarantees relative to trials do not control the rules of procedure within the Congressional Chamber. Investigations, it may bear repeating, are not trials. Therefore, the rules of a court of law do not apply. This was early decided in the cases of Robert Randall and William Duane, in 1795, and in the famous case of John Smith, a Senator from Ohio, in the same year. Since then the question has been raised repeatedly, but the decisions by the Committees, the two Houses, and the courts, have been uniformly insistent in declaring that the two Houses of Congress were not bound to follow the principles nor the precedents of courts of law in conducting investigations."

I think that view is supported also in the case of McGrain v. Daugherty, which is found in 273 U. S. 135. It is not necessary to examine that decision.

Mr. MacCracken: May I trouble you for the citation to the Supreme Court case? Both of them, if I may have them.

Senator King: The record which I read is found in Hinds' Precedents, and it is a quotation from Dimock—that is the offer—on Congressional Investigating Committees, 273 U. S. 135.

Mr. MacCracken: That is the Supreme Court case?

Senator King: Yes. The other, I think, is page
49 153 of Dimock. I thought it was inserted in Hinds' Precedents. I think that it is if I can turn to it.

Without further comment upon the matter, my opinion is that Colonel MacCracken will be required to submit for the consideration of the Committee the documents referred to in the subpœna, and the Committee will then determine, after examination, which are material and pertinent to the inquiry. If they are, notwithstanding that it may be charged that they are confidential communications between attorney and client, I think they would be admissible.

I make the suggestion, without having consulted with my colleagues, that if this view is accepted by the witness so as to absolve the Committee from the duty of looking over a large number of files—and as I understand, there are a large number of files—that Mr. Patterson, representing the Committee, or such other person as the Chairman

designates, may, in the office of Mr. MacCracken, examine the files and those letters, communications and documents which he thinks are pertinent or material or have any bearing upon the matters under investigation, that they may be brought to the Committee and then the Chairman and the Committee will determine their relevancy and materiality, and if they, upon examination, find they are material and relevant to the inquiry, that they are then available notwithstanding any claim of privilege that may be
50 asserted by the witness.

Senator McCarran: I want to supplement the remarks of Senator King and discuss it from two angles. First of all, that which is disclosed this morning indicates one matter of a serious nature, when the subpœna duces tecum was served upon the witness for the files and records, his acquiescence or permission given to the removal of any of those files impresses me as a direct violation of the summons and subpœna itself. We could have immediately impounded those files in the condition in which they existed. We did not do that.

Now it is disclosed that certain of those files have been—I might perhaps with propriety use the words, "tampered with"—but I won't go that far. I will say they have been removed, according to the testimony of the witness himself. Those papers were in his files, in his custody, in his control. He had no right to permit them to be removed during the pendency of this preliminary hearing, and while the subpœna was in full force and effect. That is the first thing.

Secondly, I view the position of Mr. MacCracken from just a little different angle. The immunity and the privilege granted to an attorney whereby he is not required under the rule to disclose confidential communications or confidential consultation between himself and his client does not and can not extend to the phase of the attor-
51 ney's work where he becomes a negotiator, so to speak, sometimes called a lobbyist—call it by whatever name you like—any dealing between so-called clients and Governmental agencies whereby he practically puts himself out of the atmosphere and category of an attorney and goes into the realm of a negotiator for the purpose of gaining an advantage for someone whom he represents from a Governmental agency. I do not believe, from my

reading of the rule, that the phase of the rule invoked by the witness is applicable in these cases any more than if one should engage a physician who, under the rule, may also invoke the right not to disclose matters of a confidential nature. If I engage a physician to deal with a Governmental agency, which might be done, could it be said with any degree of propriety that the physician could invoke the rule that he should not disclose confidential matters between himself and his client or his patient, *or his patient,* as the case may be? It seems to me to be too far-fetched.

I think that whenever an individual or an attorney takes up the work of negotiating between individuals seeking special privilege from Governmental agencies, that all matters pertaining to his services in that respect are entirely waive this privilege and authorize me to make these docu-
excluded from the rule of privilege. I think the precedents go that far and I think that common sense would go that far. Otherwise, there would be no chance for dis-
52 closures, no chance nor opportunity for a Committee to go to the depths that it should go in matters of this kind. While an attorney may perhaps advise his clients and be entirely, in some respects, protected from disclosing confidential communications, when he steps out of the category of an attorney and goes into the practice before Governmental agencies and Governmental bureaus, he leaves behind him the immunity that the law throws about him in the first instance, and the rule will not protect him from making the disclosures of matters material and relevant.

Whether it is a question of materiality and relevancy stands in a different category, but as to materiality and relevancy, my position in that respect is that it is a matter for the tribunal or committee to determine. Those are my individual views on the matter.

Senator King: Then you also support the view that in legislative investigation——

Senator McCarran: I support the view as set out by you, that in legislative investigations the rule does not apply as it does in court proceedings.

Senator White: Mr. Chairman, I am perfectly willing to make a matter of record my present thoughts about this

situation. I believe in the rule of privilege. I think that rule rests on considerations of public policy and in good sense, and I should be reluctant in the extreme to
53 see this Committee violate it.

I have had no opportunity to study the law since this question arose and I have no settled opinion as to whether the exceptions mentioned by Senator King and Senator McCarran are recognized in the law. I have some doubt about it.

But so far as I am concerned, Mr. Chairman, if clients in the circumstances which have existed during the past two or three days are ready to do such a fool thing as to go to these files and take any part of these papers while this question is under consideration by us, I can not get enthusiastic in asserting or making any controversy for the principle which I believe in. As far as I am concerned, I have no objection at all to the action which the three majority members of this Committee indicate they think ought to be taken. I can not think of anything more foolish than what these clients of yours have done. I am not going to say any more in behalf of this principle of privilege in these immediate circumstances.

The Chairman: Mr. MacCracken, may I ask that you read the subpœna which was sent to you?

Mr. MacCracken (reading):

United States of America, Congress of the United States.

To William P. MacCracken, Jr., 1152 National Press Building, Washington, D. C., Greeting:

Pursuant to lawful authority, you are hereby com-
54 manded to appear before the Senate Committee on Ocean Mail and Air Mail contracts of the Senate of the United States, on instanter, 193-, at 12 o'clock 30 m., at their Committee Room, 101 Senate Office Bldg., then and there to testify what you may know relative to the subject matters under consideration by said Committee.

Bring all books of account, bank pass books, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air mail and ocean mail contracts.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To J. A. Bradley, L. F. Rittelmeyer to serve and return.

Given under my hand, by order of the Committee, this 31st day of January, in the year of our Lord one thousand nine hundred and 34.

HUGO L. BLACK,
Chairman, Committee on ——.

Then there is the endorsement to be filled out on the back.

The Chairman: And in obedience to that you appeared before the Committee? That subpœna was not limited to papers which were in your files, which may have been written by someone else? As I construe that subpœna, it called for all files. In deference to your suggestion of privilege
55 and upon your statement made to the Committee that upon your honor as a lawyer and that of your partner this Committee could rest assured, as I recall it—you can correct me if I am incorrect—that the files were there and would remain there, the Committee took this matter under advisement.

Mr. MacCracken: I don't recall that. My recollection is, Senator, that what I stated was that my partner and myself would examine these files and only withhold such as we considered came within the rule of privilege. Now if I made any such statement as the other it has slipped my memory. I may have done so.

And I want to state now that I realize, as I did not before, these circumstances, the mistake which we permitted to be made yesterday on this matter. I can assure you at the time there was no intention to violate any pledge which I had given to the Committee.

With reference to the matter of further release on the privilege, Mr. Patterson has just handed me a copy of a telegram which he says was telephoned from my office. It reads as follows:

"William P. MacCracken, Jr.,
"National Press Building,
"Washington, D. C.

"With reference to your telegram you are hereby
56 authorized to permit Senator Black's representatives to examine such correspondence as we have had with you as our attorney.

"(Signed) L. H. BRITTIN,
"Ex. Vice President,
"Northwest Airways."

That was evidently received this morning after I left for the hearing.

57 The Chairman: Whatever the exact statement that was made, the Committee certainly had no right to anticipate that while this subpœna was pending, papers would be removed from the office.

I wish to make a few statements in connection with the entire broad subject, because I think it is of vital importance not only in connection with this but other questions that may arise concerning this Committee and other Committees.

In the first place, you have appeared before the Committee and claimed that your correspondence, memoranda and communications between yourself and certain clients are privileged. You base this claim upon the principle that certain confidential communications between a lawyer and his client are privileged to the extent that they cannot be used as evidence in connection with lawful employment over the objection of the attorney.

It is my belief in the first place that the employment of an attorney must be for legal subjects. It must come within the scope of what is generally recognized as legal duties. All of us know that the services with reference to negotiating with departments can be handled by others as well as by lawyers. I do not recognize and do not intend to recognize that the employment of a lawyer to negotiate with departments or with reference to legislation is within the scope of legal services. It can be performed by others as well as lawyers. Evidence before this Committee

58 which has not yet been offered shows that even interior decorators have been employed for these purposes, officials of companies, various individuals, so that in the first place I do not recognize that a claim can be based upon privilege for these negotiations with departments or for legislation simply because the man who happens to be employed is a lawyer.

There is a distinction which custom has brought about between services of a lawyer as a lawyer and services of a lawyer for some other purpose. If a lawyer should be employed to negotiate a trade for a wholesale mercantile establishment, certainly the communications would not be privileged, and the same thing in my judgment would apply to the employment of a lawyer to negotiate with the Gov-

ernment. It is not, in my judgment, a legal service, and for that reason, among others that have been suggested, it is my belief that a man, because he happens to be a lawyer, cannot claim a privilege for communications between himself and his employer. I recognize it as a contract of employment—not as a contract of employment as a lawyer.

In the next place, it is my belief that this privilege referred to, when legitimately invoked in a proper proceeding, should be protected where it is for a legal service, and in connection with a proceeding where privilege is
59 recognized. Whether the Senate Committee should recognize the privilege or not, I do not base my opinion upon my judgment upon that principle.

It is my further opinion that evidence should not be considered as privileged where the employment is for other than legal employment as generally recognized, where it is for an unlawful purpose or for the performance of duties contrary to public policy. Even if the original employment is legal but it is carried out in an unlawful manner or contrary to public policy, it is my judgment that such conduct would not then be privileged.

In other words, there is a clear and well recognized distinction between the kind of employment existing between attorney and client. When the nature of the employment of the attorney is such as to make the contract of employment void as against public policy or void by reason of the nature of the acts to be performed under the nature of the employment, or for other than legal services, manifestly this privilege should not be permitted to defeat justice.

It is my own belief that the employment of an attorney to aid in breaking down competitive bidding or to secure advantages over another competitive bidder is contrary to law and to public policy. The principle of competi-
60 tive bidding for Government services or Government contracts is well grounded in our system. This principle of competitive bidding was devised and provided for the purpose of protecting the public and the taxpayers from exorbitant prices for services or for commodities.

Congress itself has recognized the extreme importance of preserving this competitive bidding system and has not only provided that contracts obtained by collusive bids are invalid, but has expressly disqualified the bidder from obtaining a Government contract for a period of five years.

The evidence before this Committee has already clearly demonstrated to my mind that there was a secret gathering of aviation operators adjacent to the office of the Postmaster General for unlawful purposes. The public was excluded from this meeting. Only those acceptable to the Postmaster General and to the operators themselves were permitted to participate.

The evidence has also further disclosed that against the best interests of the Government and in order to unjustly, unfairly and illegally award certain mail contracts to certain participants in this meeting, an agreement was reached by the participants and the Postmaster General dividing up the air mail routes among one another.

The Chairman of this meeting was Mr. William P. MacCracken and the arbitrator was Postmaster General
61 Walter F. Brown. In my judgment, it would be contrary to the principles upon which the accepted idea of an attorney's privilege is based to extend it to communications relating to such transactions. Instead of protecting the ancient right of privileged communications between attorney and client, it is my judgment that such action on the part of this Committee would open up a train of evils which would inevitable result in the destruction of this fundamental doctrine and would defeat the ends of justice and fair dealings.

Numerous authorities could be cited to support these principles. An argument on the subject can be found in the case of Alexander v. United States, 138 U. S. Reports, p. 353.

It is my belief that this Committee should immediately obtain access to all the correspondence and communications passing between Mr. MacCracken and the air mail operators referred to in his evidence or bring it before the Committee, and should immediately issue a subpœna duces tecum to Mr. Brittin and Mr. Givens. I am not sure that they should not be cited for contempt.

I am not willing to recognize either in this case or in any other case a privilege under these circumstances. This privilege was intended to protect the relationship of lawyer and client in a bona fide legal representation concerning a legitimate and lawful subject-matter, for the ac-
62 complishment of a purpose in a legal and lawful matter. It is my belief that the employment of at-

torneys or individuals in the City of Washington or at other places for the purpose of obtaining advantages before Government Departments in the matter of Governmental services or contracts in such way as to prevent, obstruct or hinder legitimate competitive bidding, is not an employment which should be looked upon with favor, and in fact, is contrary to the best interests of the public and, therefore, contrary to the public policy of the nation.

Now, I believe, to be the appropriate time and occasion to declare that Government contracts should be awarded, free from outside influences, which influence would be worthless if special advantages in obtaining such contracts was not the objective of the employment. It is my belief, as I have stated, that none of the communications to which reference has been made are privileged; that all letters, papers, communications, and records, should be immediately produced for this Committee or should be made available for their use.

The employment for obtaining Government contracts, in my judgment should be discouraged, not encouraged. If the papers are not produced or made available, I believe this Committee should take immediate appropriate legal steps to obtain them.

I have stated these views because of my belief of the great importance of the question which has been
63 raised, not only as to the privilege claim, but by reason of the practice which has grown up in Washington, particularly of employing people, lawyers and others to aid in obtaining Government contracts. I do not believe that such employment for the purpose of aiding in the passage of legislation comes within the generally recognized scope of a lawyer's business. If it did, lawyers only would be employed, but others can practice in this way besides lawyers. No one can practice in the courts as a lawyer unless he has a license.

With reference to communications touching cases in the courts, so far as I am individually concerned, I would favor protecting them, either in a Senate Committee or elsewhere, even though I do not believe that the Senate Committee would be required to do so under the law as stated by Senator King, but as a question of policy with reference to the preservation of this privilege, which is a part of the public policy of the nation in connection with

employment for legal purposes by a lawyer within the scope of a lawyer's business, I would favor protection of the privilege.

I do not make that statement with any view to leave the impression that a lawyer should decline that employment any more than any other individual should decline the em-

64 ployment, but I do draw a distinction in my own mind between the employment of a lawyer for services which can be as well performed by a doctor or an interior decorator or a man who simply lives in Washington and does nothing else, and the employment of a lawyer to perform the duties which his license gives him the exclusive right to practice. That is the distinction I am seeking to draw, and I want it clearly and distinctly understood that, so far as I am concerned as a member of this committee and as a member of the Senate, I think this to be the appropriate time and place to take such action as will not encourage the continuation of practices before the departments with reference to matters which should be let by competitive bids, free, uninfluenced from outside sources.

For that reason I am perfectly willing to accede to the suggestion of Senator King, if it meets with the witness' plan, to let the investigators go over the papers. But if that is not to be done, not only with reference to these gentlemen who have replied, including Colonel Brittin, who has replied after he got his papers back, but with reference to all of them, I favor immediately impounding the evidence. I state that without any criticism of you for claiming this privilege as an attorney.

It is my judgment that the duty of an attorney is to claim a privilege if he is serving as an attorney, and has a privi-

65 lege to communication—I recognize that—but I take the position that they are not privileged, that the employment is not as an attorney, that it never has been as an attorney, and that by reason particularly of the special circumstances which have developed before this committee, even if the employment had been as an attorney, the circumstances of the meeting at the Post Office Department are sufficient to remove any privilege which might otherwise exist.

I would be very glad if, without the necessity of issuing any kind of papers, or enforcing the ruling of the Commit-

tee by impounding the evidence, they should be immediately made available.

Senator White: Mr. Chairman, I think you have made a very strong and a very persuasive statement. I should not want, without study of the question, to go on record as differing with the legal views you have expressed. I have had no opportunity to study this as a legal question. What you have said has so much impressed me, however, that I would not want to go on record as indicating a contrary view to that which you have expressed. I am perfectly willing to indicate my approval of the suggestion made by Senator King, so that we may have, with respect to that, the unanimous action by the Committee. As to the board and general principle of law, I don't know that it is necessary for us to immediately decide it.

66 The Chairman: I don't think so.

Senator King: Colonel MacCracken, are you willing that all the papers in your office now relating to these transactions referred to shall be examined by counsel for the Committee or their representatives and that they shall select from the mass of memoranda, papers and so on that you have such as they deem relevant or pertinent to the investigation which is being carried on by this Committee, and that those papers so selected by them shall be brought to the Committee and the Committee then shall determine just what part or all they may desire to have inserted in the record as a part of the hearings.

Mr. MacCracken: Mr. Chairman, before replying to Senator King's question, may I make a statement? Will that meet with your approval, Senator King?

Senator King: Yes.

The Chairman: Go ahead.

Mr. MacCracken: I feel sure that the Chairman of this Committee and the members of this Committee would not want knowingly and willingly to reach and publish a judgment without hearing both sides of the case. My employment by these air mail contractors and those who sought contracts involved the performance of legal services as well as services which were perhaps not legal.

Whether you are working for a client in Washing-
67 ton or any other city in the United States, we all know that lawyers are constantly called upon to per-

form services which can be performed by laymen. Unfortunately, it is also true that laymen sometimes are called upon and do perform services which should be performed only by lawyers.

I tried to make my position clear to the Committee when I appeared here day before yesterday, that in so far as any communications between myself and the officers of the Government or members of Congress were concerned, that those I did not consider came within the privilege and any matters which had to do, perhaps, with negotiations that were not legal—it is difficult sometimes to determine where a knowledge of the law is essential and where it is not, and sometimes a man gets along without a lawyer when he should have one, even though they may not be performing legal duties within the definition of the law.

My desire was solely to perform the duty which I felt and which I feel every member of this Committee recognizes a lawyer owes to his client. It is not a rule of evidence that is involved. It is a rule of law, a rule of the common law, the cloak of privilege which the common law throws around the confidential communications between an attorney and a client. The client is the one who determines whether or not those communications are confidential. Of course the attorney in the first instance, if
68 he is the one that is called upon to reveal them, is the one who is in duty bound to assert the privilege, but he has no right to waive it. I think that that is accepted as the law by all the members of the Committee.

With reference to the distinction between court proceedings and legislative inquiries, I recognize, as Senator King pointed out, that the strict rules of evidence with reference to hearsay testimony, secondary evidence, matters of that kind do not apply. But this is not a rule of evidence that is involved. It is a privilege, and as I say on that, it is one that I have no right to waive.

Now I also feel that at this time I may be privileged myself to make a word of explanation with regard to the meeting which the Chairman referred to in his opinion, and which he felt, because of my participation in that meeting, deprived my clients, both those whom I represented there and those whom I represented afterwards—because there were some of the clients on these lists that I did not represent at that time, the majority of them I did not

represent in that meeting, there are only two that I represented in that meeting—deprived them of the right of the privilege. That meeting was called by the Postmaster General. We were there at his invitation. We did not determine who should attend the meeting and who should not attend the meeting. A gentleman by the name
69 of Mr. Moore and I forget the other, was it Wolman, were among the first ones—I guess they were not the first—that had not been invited that came to my office and asked if they could attend the meeting. I explained to them that I had nothing to do with the make-up of the personnel of that meeting, that we had been called there in an advisory capacity by the Postmaster General; that as far as I was concerned I would be very glad to have him and his client attend the meeting and that I would bring the matter to the attention of the Postmaster General, which I did, and they attended a subsequent meeting.

The gentlemen who attended the meeting came on the last, or the next to the last day, as I recall it. The meeting was originally convened, if my recollection is correct, on the 19th of May, 1930——

Senator King: I have just had a call from the White House and it will be necessary for me to leave. Please excuse me.

Senator McCarran: I have had a call too. I mean no discourtesy to you, Mr. MacCracken.

Mr. MacCracken: I appreciate that and I appreciate the expression of frankness on the part of the members of this Committee, and I have the highest regard for it. If I come to the conclusion that the duty which the law
70 imposes upon me is in conflict with the opinion of the Committee, I will do so with the very deepest regret. I would like, however, before winding that up, to continue my statement. I was saying that that meeting was originally called for the 19th of May, or it met on the 19th, as I recall it. The Postmaster General at that meeting recited the events which had led up to the passage of the 1930 amendment to the Air Mail Law. I won't attempt to quote his language, but briefly, the facts were these:

The original law was passed in 1925, as I recall it. At least that was when the first contracts were let. The contracts were let for a four-year period. In 1928 when, as the result of unrestricted competitive bidding, lines had

been bid in at ridiculously low prices—I don't recall whether the contract I am about to speak of was bid in in 1928 or 1929, but in one of those years, I think it was, that one was bid in at as low a rate as 9 cents a pound.

The result was that the first amendment in 1928 provided for an extension of the existing contract—that is, if in the judgment of the Postmaster General it was in the public interest—in order to protect the equities of the pioneers who had gone out and started these routes, not knowing what the return was going to be, and who had sustained substantial losses.

71 That legislation provided that the Postmaster General could accept a surrender of the contract any time before it expired, and after it had been in operation two years, and exchange therefor a route certificate which would be good for not to exceed ten years from the time that operations started under the contract.

The consideration running to the Government for the extension of the time of the contract was that the Postmaster General should have the power to fix the rate of compensation to be paid the carrier which should not exceed the rate per pound which the carrier had bid in originally securing the contract.

While that law was passed under the administration of Postmaster General New, no action was ever taken under it. When Postmaster General Brown came into office, the first of these four-year contracts was nearing the period of expiration. He was new to the air mail business, or, perhaps I should say, it was new to him.

The Chairman: What department had he been in before he went with the Post Office Department?

Mr. MacCracken: He had been with the Department of Commerce.

The Chairman: What had he been doing in that department?

Mr. MacCracken: Assistant Secretary.

The Chairman: Which Assistant Secretary?

Mr. MacCracken: The assistant that had to do with matters not connected with aviation.

72 The Chairman: What did it have to do with?

Mr. MacCracken: Domestic and foreign commerce, Bureau of Standards, Bureau of Lighthouse, save and except the Bureau of Aviation, and there was the Bureau

of Standards again, as far as the aeronautical activities were concerned, Bureau of Mines, Coast and Geodetic Survey. Again there was an exception there so far as their airway map program was concerned, and generally all the other bureaus.

The Chairman: That did include, however, did it not, the shipping, foreign and domestic commerce?

Mr. MacCracken: I believe in the Bureau of Foreign and Domestic Commerce there was a division that had to do with marine transportation. I forget the exact name of it, but I recall that there was such a bureau.

The Chairman: And it is true, is it not, as I understand it, that Mr. Brown, as Assistant Secretary of Commerce, before he became Postmaster General, was in charge of the departments of the Secretary of Commerce that controlled the Merchant Marine in so far as it was controlled by the Department of Commerce?

Mr. MacCracken: I believe that is correct, Senator. He was the one who was performing the duties. Perhaps I should let him answer on that, but there were only two Assistant Secretaries. Some of the work was delegated to the solicitor of the Department, at times.

The Chairman: But in 1928, before he became
73 Postmaster General, he did have charge, for the Department of Commerce, of that department which had control over the Merchant Marine, did he not? And shipping?

Mr. MacCracken: I think so.

The Chairman: And had had for several years.

Mr. MacCracken: Not for several years, because I think he was only with the Department for about a year and a half, or less, maybe.

The Chairman: And that was immediately before he became Postmaster General?

Mr. MacCracken: Yes, sir. He went from Assistant Secretary of Commerce to the Postmaster Generalship.

The Chairman: All right. Go right ahead.

Mr. MacCracken: But in that connection I should say that he evidenced no interest whatsoever that I can recall in aviation during the time that he was in the Department of Commerce. The Postmaster General, Mr. Brown, after he had had the time to familiarize himself with the situation with reference to air mail contracts, apparently

reached the conclusion that the amendments which Congress had passed in 1928 would not suffice to enable these lines which had taken in their contracts at ridiculously low prices, that they were just losing money like water through a sieve, to continue, and apparently he came to the conclusion that the way to pay the air mail contractors was not on a poundage basis but on a mileage basis,
74 and that they should all be treated equally.

As you are aware, the postal laws permit the Postmaster General, without competitive bidding, to put mail on all of the railroads. In that particular case, the rate paid by the Government is not fixed by the Postmaster General, but is fixed by the Interstate Commerce Commission, which would appear to be, on the face of it, and which I think is, an added protection to the carriers, because, if my recollection serves me correctly, the carriers on several occasions have gone to the Interstate Commerce Commission, over the opposition of the Post Office Department, and have had their rates increased.

The bill which the Postmaster General sent up to Congress, understand, was first introduced by Congressman Watres in the House. I think it was H. R. 9500, if I recall it correctly, and involves the precedent with reference to railway mail except that both in the certificate and in the case where mail was put on lines that had been operating six months under regular schedules over routes 250 or 400 miles—I am not sure which, both figures entered into it—the Postmaster General had the power to fix the rate and not the Interstate Commerce Commission. So that the only appeal which was left to a contractor who was not satisfied with the rate that the Postmaster General might fix was to the courts and not to the Commission. I was always of the opinion, and still am, that a contractor, under those circumstances, has the right of appeal
75 to the court, although no such right, as far as I know, has ever been asserted.

That was the situation, as I understood it, with reference to the air mail when that legislation was sent up to Congress. There was opposition to it and the contracts were about to expire. Some of them had been extended under the six months extension privilege.

One of the other provisions in the original legislations which was sent up—and it is in the Act as passed—was that the Postmaster General could make any extension or consolidation of existing routes. Prior to that time it is my understanding that the Comptroller General had ruled that the Postmaster General could make an extension not to exceed one hundred miles of an existing air mail route, provided it did not extend the route beyond a thousand miles. I have forgotten whether it is in the opinion, but I have always understood the reason for the thousand mile limitation was because the contractor was entitled to an added compensation under the original law if the carriage exceeded one thousand miles.

Now those are some of the complicated problems which were presented to the Postmaster General when he came to the matter of this legislation. The legislation which was finally passed was a compromise. It did not authorize him to put mail on any route that had been running, but it did give him these broad powers with reference to extensions and consolidations.

The legislation was passed, as I recall it, on the last
76 of April in 1930. The contracts were to expire some time in May, those that had been extended. The first business at hand was the surrender of the contracts and the getting of the route certificates.

But to my mind the examination of the route certificates and any questions that arose in connection with it called for legal drafting, called for legal contracts, and was one of the things in which I represented the Western Air Express.

After that was out of the way, the Postmaster General then called a conference of the operators and he explained to them that this air mail map had grown up in a sort of hodge-podge fashion, that it was the intention of Congress that the pioneers, particularly those who had pioneered in passenger business, without air mail, and of whom there were a great many, should be given recognition and assistance. He had had some public hearings on the question of new routes in the Department, and now he wanted advice on and recommendations of this group of the operators, some of whom were mail contractors and some of whom were not. He put up the problem of existence of extensions; he put up the problem of extension of existing

routes, and also of the establishment of two transcontinental routes.

As I recall it, he said that he had just one suggestion to make, and that was that the two new transcontinental routes should be competitive as between themselves, and with reference to the existing route. In other words,
77 he wanted a competition of service from three transcontinental routes and he wanted them segregated, one from the other. He said, "It is not your problem to determine how this will be worked out. All I ask of you is your recommendations and I would like to get them as quickly as possible."

With that, he withdrew from the meeting. I understand some question has been raised as to how I happened to become chairman. As the Postmaster General was going out of the meeting, I think it was Mr. Cathell, a lawyer from New York, who suggested to the Postmaster General that this was a rather large group and that somebody ought to be charged with the duty of presiding. The Postmaster General said to Mr. Cathell, in reply, "I would prefer that you would select your own chairman, or organize in any way you see fit. The facilities of the Post Office for meeting places, and all that sort of thing, are at your disposal." With that, he walked out.

Then Mr. Cathell said, "I nominate Bill MacCracken." This was after the Postmaster General retired. Mr. Cathell said, "I nominate Bill MacCracken to act as chairman of the meeting, because, as I understand, he is here representing two clients, one of whom is an air mail contractor and the other is not, and I think he should be the presiding officer," or something to that effect.

78 He put the question and it was unanimously carried, and from that time on I acted as Chairman of the meeting. Before doing so I incidentally called my clients together, two of them, and said, "This matter may take me out of some of the discussions, because I intend to preside and not argue all the way through." They said, "That is all right, we will do our part of the presentation."

That meeting was not secret, as I regard it. We have no authority other than to make recommendations, and we finally made recommendations, the majority of which were not carried out, I think, as things have since turned out.

The Chairman: Are you sure about it?

Mr. MacCracken: I haven't checked it to make sure on the majority, but they were not carried out right away, and a great many of them have never been carried out.

The Chairman: Which ones?

Mr. MacCracken: There was never an extension to Lethbridge, which was recommended.

The Chairman: Who was to get it?

Mr. MacCracken: The National Parks.

The Chairman: What other?

Mr. MacCracken: It was a long time afterwards before the Albany-Boston extension was in effect. It finally was.

The Chairman: Who got it?

Mr. MacCracken: Aviation Corporation.

79 The Chairman: Who was recommended to get it?

Mr. MacCracken: They were recommended, as I recall it. I don't think the Vancouver extension was ever put into effect. That was one where United was to get the first schedule and Varney was to get the second, according to the recommendations.

The Chairman: What others were not carried out?

Mr. MacCracken: Well, let me see. I don't have my copy of that report with me.

The Chairman: Have you the map?

Mr. MacCracken: No, sir.

The Chairman: What went with the map?

Mr. MacCracken: The map was with the report.

The Chairman: Turned over to the Postmaster General?

Mr. MacCracken: I think so, or to one of his assistants. I am not sure whether he took it or Mr. Glover or Mr. Wadsworth. I think they were all there in the meeting. What became of the map I don't know.

The Chairman: As a matter of fact, Mr. MacCracken, is it not true that every air mail contract that was awarded was awarded according to the recommendations made at that meeting?

Mr. MacCracken: No, sir.

The Chairman: Which ones were not?

Mr. MacCracken: I have just mentioned two.

80 The Chairman: You say they were not awarded?

Mr. MacCracken: Oh, awarded. I remember very well when we turned in that report the Postmaster General

said, "Gentlemen, you have decided"—not decided, but made recommendations——

The Chairman (interposing): I don't want to interrupt, but I asked you the question if it is not true that every air mail contract that was awarded was awarded according to these recommendations?

Mr. MacCracken: You mean where there were definite recommendations?

The Chairman: For a certain company to get a certain line.

Mr. MacCracken: Well, I would want to check on that. I am not absolutely certain about it. That is not true, Senator.

The Chairman: All right, which one did not get what was allotted to it?

Mr. MacCracken: Western Air Express did not get the extension from Amarillo to Dallas.

The Chairman: Senator White has suggested to me he understood the meeting was called for the purpose of passing on this question, which was true. Of course we want to have the correspondence before we go fully into this matter, and I told him that I was not objecting to your talking, because I thought you wanted to make this statement. We do not want to go fully into that matter at this time, but I don't want to deprive you of the right which you asked to make a statement, and that is what I told
81 Senator White.

Senator White: I did not want to interrupt anything you might want to say which bore on this question of privilege, but I had assumed this was to be a meeting of but a very few moments, and I had made some appointments. I am late to them now and I was getting a little fretty. Will you confine yourself at this time to anything that bears on this question of privilege—if that is all right, Mr. Chairman, with you?

The Chairman: That is all right.

Mr. MacCracken: There is, I believe, another side to the story with reference to what transpired in those conferences that led up to the recommendations to the Postmaster General and what transpired afterwards, and as far as the facts and the happenings are concerned I trust that the Chairman and the other members of the Committee will reserve their judgment until they have heard both sides.

The Chairman: I should like to state to you, Mr. MacCracken, that I will be very glad to join with the other members of the Committee in according you the privilege of making a statement or testifying at any time you desire to testify. I do not want to interrupt you now by reason of the fact that we have made some statements.

Mr. MacCracken: I appreciate that, and I felt that they perhaps called for an answer, and I have attempted
82 to make a partial answer.

Now, then, with reference to the matter of these files and records——

The Chairman (interposing): What the Committee would like to know is this: If you will give them access immediately to these records, so that we do not have to send down and impound them. Getting back to these files, may I ask if these files were taken in the day time while the inspectors were there.

Mr. MacCracken: I am not sure with reference to Colonel Brittin when he came in and got his. I think these papers which Mr. Givin took were taken after the inspectors left.

The Chairman: The inspectors said to us that they stayed there throughout the day and no papers were removed while they were there.

Mr. MacCracken: I can not be sure, because I did not give Colonel Brittin his papers.

The Chairman: What time did you give them to Mr. Givin?

Mr. MacCracken: I think Mr. Givin left the office between 6:30 and 7:00 o'clock.

The Chairman: Did you call him and ask him to come down?

Mr. MacCracken: No, sir, he called me. I did not send for him.

The Chairman: Did he know about the examination that was going on?

83 Mr. MacCracken: I think he did.

The Chairman: They got both papers, did they not, after the inspectors left?

Mr. MacCracken: I don't believe that is the fact with reference to Colonel Brittin.

The Chairman: The inspectors state they knew nothing about it, certainly they were not told anything about it, according to the information they gave us, and they stated

they remained there throughout the day until the office closed.

Mr. MacCracken: I would have to check up with Mr. Lee, because he is the one who turned over the papers to Colonel Brittin.

The Chairman: Did you go back to the office with Mr. Givin after it had closed?

Mr. MacCracken: No, sir. He came while I was still there. I did not go back to the office after I left last night and went home, until this morning.

The Chairman: Of course you understand that the attitude of the entire Committee is that they want the papers, and if you will give them access to them now, they can go right ahead and look at them. If not, the Committee will send down and impound the papers.

Mr. MacCracken: I regret exceedingly having done anything which would call forth the comment which has come from the Committee. It was certainly unintentional
84 on my part, and I will be only too glad to do what I can to rectify it.

Senator White: It has made a very embarrassing situation for some of us who have been inclined to recognize this privilege which exists. So far as I am concerned, I had assumed, without any question whatsoever, that while this matter was being discussed in the Committee, there would be no change in the status with respect to these papers, and it came as a shock and a disappointment to me to find that some of these papers, which were possibly within the reach of this subpœna, had left your office. I just cannot justify that. I can not see any possible justification for it, and, as I said a moment ago, I have lost some of my enthusiasm for the principle.

Mr. MacCracken: I can assure you, Senator, I will do everything within my power to rectify that situation.

The Chairman: You mean you will try to get them back immediately?

Mr. MacCracken: Yes, sir; certainly.

The Chairman: And will you let the inspectors now go ahead and see them, without the necessity of impounding the evidence?

Mr. MacCracken: There is no occasion to impound the evidence, Senator, I think, in this matter.

The Chairman: Then you will permit them to see them?

Mr. MacCracken: I have not said anything about seeing them, but I can assure you——

85 The Chairman (interposing): If they can not see them now, the Committee has decided to send down for them, if they are not to be granted access to them. They have ruled against your question of privilege unanimously, those of the members of the Committee who were here.

Senator White: I was in accord with the motion of Senator King, and I am in accord with it, because of the unusual circumstances which exist here.

The Chairman: So it is a question now for decision, whether we shall have to send for the records, or whether you will make them available. That seems to me to be the most practical way, because they are there, and this Committee has the power to obtain them.

Mr. MacCracken: Of course that is the question.

The Chairman: I do not think it is a question about the Committee having the power to obtain them. The only question is whether you have the right to claim the privilege. Of course, if you do not desire to do that, we will send for them immediately. But we do not care to do that if it can be handled otherwise.

Mr. MacCracken: May I be accorded the privilege of telephoning for some counsel and advice on this question, by an interested party?

The Chairman: If it is just a matter of a few minutes, we will wait here until you call up.

86 Mr. MacCracken: Thank you.

(A short recess was taken to permit the Witness to telephone.)

Mr. MacCracken: Pursuant to the privilege accorded me by the Committee to seek advice, I have done so and I am again advised that this is a privilege which I have no right to waive.

The Chairman: All right.

Mr. MacCracken: I am very sorry.

The Chairman: That is all.

The Committee will adjourn until ten o'clock, Tuesday morning, February 6, 1934.

(Whereupon, at 12:30 o'clock p. m., the hearing was adjourned until Tuesday, February 6, 1934, at 10:00 o'clock a. m.).

87 EXHIBIT F.

Investigation of Air Mail and Ocean Mail Contracts.

Saturday, February 3, 1934.

Special Committee on Investigation of Air Mail and Ocean Mail Contracts.

The Committee met at 11 o'clock a. m., in Room 318, Senate Office Building, Washington, D. C., Senator Hugo Black (Chairman) presiding.

Present: Senators Black (Chairman), McCarran, Austin, and White.

Also present: Mr. A. G. Patterson, Special Investigator for the Committee.

Proceedings.

The Chairman: The Committee will please be in order. Colonel Brittin, will you please take the stand?

Testimony of Colonel L. H. Brittin.

(The witness was duly sworn by the Chairman.)

The Chairman: What are your initials, Colonel?

Colonel Brittin: L. H. Brittin—B-r-i-t-t-i-n.

The Chairman: With what company, or air mail company, are you connected?

Colonel Brittin: The Northwest Airways.

88 The Chairman: What is your official position?

Colonel Brittin: Executive vice president.

The Chairman: Do you have an office in Washington at 1090 National Press Building?

Colonel Brittin: I do, Senator.

The Chairman: Did you have an office at 1090 National Press Building, Washington, for the last ten days?

Colonel Brittin: Yes, I did.

The Chairman: Did you receive a telegram from Mr. MacCracken, William P. MacCracken, Jr., on January 31, 1934, with reference to his files and memoranda?

Colonel Brittin: I don't recall it, Senator; I don't recall any such telegram.

The Chairman: You replied to it, did you not?

Colonel Brittin: I don't recall. You will have to refresh my memory on that.

The Chairman: Will you read this (handing to the witness a copy of the proceedings of the Committee of February 2nd)?

Colonel Brittin (after examining minutes): Yes, sir; I received that telegram.

The Chairman: Will you read that, so it will get in the record?

Colonel Brittin: I have today been subpœnael to produce before the Black Committee all papers, memoranda, correspondence, maps, copies of telegrams relating to air
89 and ocean mail contracts stop In so far as these involve confidential communications between us as attorney and client I have felt it my duty to assert and I have asserted the privilege which the law places around such communications stop The privilege may be waived only by you as client stop The Committee has requested me to inquire whether you desire to waive this privilege and authorize me to make these documents available to the Committee investigators stop Please wire your decision. (Signed) William P. MacCracken, Jr.

The Chairman: When did you receive that telegram?

Colonel Brittin: I don't recall, Senator, but it must have been, of course, the day on which it was sent. It was sent to 1090 National Press Building.

The Chairman: Did you get it at the Press Building? Do you remember when you received it?

Colonel Brittin: No, right this minute I don't recall when I received it, but I must have received it there.

The Chairman: The first time you saw it, was it at the National Press Building?

Colonel Brittin: Yes.

The Chairman: Did you communicate with Mr. MacCracken then?

Colonel Brittin: No, I did not.

The Chairman: How long before you did communicate with him?

90 Colonel Brittin: I sent him a telegram assenting to this.

The Chairman: To what? You assented to this, but you assented how long after you received it?

Colonel Brittin: I presume it must have been within 24 hours.

The Chairman: Do you recall that you assented to it at the time Mr. MacCracken was before the Committee the second time?

Colonel Brittin: I don't recall just when I assented to it, but I wrote a telegram in my office and sent it to Mr. MacCracken.

The Chairman: Now, in the meantime, before you sent the telegram assenting to the request, had you seen Mr. MacCracken?

Colonel Brittin: No, I had not.

The Chairman: You had not seen Mr. MacCracken at his office?

Colonel Brittin: No, I had not.

The Chairman: Did you go to his office?

Colonel Brittin: Yes, sir.

The Chairman: When?

Colonel Brittin: I don't recall just when I was there. It was either Wednesday or Thursday, I think, or maybe before that.

The Chairman: It was after you received the telegram from him, was it not?

91 Colonel Brittin: I am not clear on that, Senator.

The Chairman: Do you not know, Mr. Brittin, that your telegram was sent and reached Mr. MacCracken while he was sitting here testifying the second day, at the very time that he testified that you had already been to his office and had taken some of the files away?

Colonel Brittin: Well, then, that must have been the facts of the case, then.

The Chairman: How did you happen to go to his office?

Colonel Brittin: I just went to his office to inquire for Mr. MacCracken, and he was engaged.

The Chairman: What time of day or night was it?

Colonel Brittin: I think it was in the middle of the day, sometime; it was during office hours.

The Chairman: During the middle of the day?

Colonel Brittin: Well——

The Chairman: Did you see either of those two gentlemen sitting back there, Mr. Brittin?

Mr. Bradley, will you stand up?

(Mr. Bradley arose.)

The Chairman: Did you see him down there?

Colonel Brittin: No.

The Chairman: And you state that you were there in the daytime?

Colonel Brittin: Yes, I was.

92 The Chairman: Did you go into Mr. MacCracken's office?

Colonel Brittin: I went into his office.

The Chairman: Did you go in immediately when you got there?

Colonel Brittin: Yes, I went into his suite of offices. I did not get into Mr. MacCracken's private office.

The Chairman: Whose private office did you go to when you got in?

Colonel Brittin: I went to—Mr. MacCracken was engaged, and I first went to Mr. Lee's office.

The Chairman: Who is Mr. Lee?

Colonel Brittin: He is a partner of Mr. MacCracken, the firm of MacCracken and Lee.

The Chairman: What took place there?

Colonel Brittin: I asked Mr. Lee if I could see the files of the Northwest Airways. I stated to Mr. Lee—I had used his office, I had used the office of MacCracken and Lee as my Washington address last summer, and I felt that some of my personal papers might be mixed up in this Northwest file, and that I wanted to take my personal papers out, and he permitted me to see the file. I went through it—it was quite voluminous. I did not examine everything that was in it. It contained a lot of legal opinions on various matters, and I took about half a dozen papers that were purely personal, and turned the file back to MacCracken & Lee.

93 The Chairman: You knew at that time, did you not, Colonel Brittin, because you had already been notified by Mr. MacCracken, that the Senate Committee had requested his files, correspondence, memoranda, et cetera, relating to air mail?

Colonel Brittin: Oh, yes.

The Chairman: You knew that?

Colonel Brittin: I did.

The Chairman: And it was for that reason that you went down to look over the file, was it not?

Colonel Brittin: For the reasons as stated. I went there for the purpose of taking some personal matters which had inadvertently gotten into the Northwest Airways file that had no relation whatever with the matters under consideration.

The Chairman: But you were prompted to go, were you not, by your knowledge of the fact that the Senate Committee had a subpœna outstanding, and that request had been made on you to know whether your company would waive any privilege which Mr. MacCracken might have?

Colonel Brittin: I knew that the files were about to be publicly examined.

The Chairman: And that is the reason that you went down and took part of the file out?

Colonel Brittin: I took six papers out.

The Chairman: What was the reason you went down and took part of them out?

94 Colonel Brittin: The reason I went there, as I stated, was that these were purely personal matters and did not belong in Mr. MacCracken's file.

The Chairman: But the reason you went to get them was that you did not want the Senate Committee to get them?

Colonel Brittin: I did not think they had any relation——

The Chairman (interposing): That was the reason you went, Colonel Brittin, that you did not want the Senate Committee to get those parts of the files?

That was your object, was it not?

Colonel Brittin: It was not so much a matter of the Senate Committee, Senator, as it was a matter of public examination. Those were personal papers.

The Chairman: The thing you wanted to do was to take those files out before the Senate Committee investigators got them?

Colonel Brittin: Before the public examination.

The Chairman: Before the examination by the Senate Committee—that was the object, was it not?

Colonel Brittin: In a broad way, I suppose it was.

The Chairman: You knew that the Senate Committee had sent a subpœna down there, because Mr. MacCracken had notified you, and you had read it in the papers, also, hadn't you?

Colonel Brittin: Yes.

The Chairman: You took those letters out, and
95 what did you do with them?

Colonel Brittin: I took them down to my office and tore them up, as I would any other papers, and threw them in the waste paper basket.

The Chairman: Threw them in the waste paper basket?

Colonel Brittin: Yes.

The Chairman: Did Mr. Lee agree for you to take them out?

Colonel Brittin: Well, the firm of MacCracken & Lee made no objection.

The Chairman: Did he tell you that it was taking papers out that the Senate Committee wanted, or did he protest in any way?

Colonel Brittin: No.

The Chairman: He did not?

Colonel Brittin: No.

The Chairman: Then Mr. Lee agreed for you to take the papers out of the files?

Colonel Brittin: He did not protest, Senator.

The Chairman: He did not protest?

Colonel Brittin: No.

The Chairman: Where did he get that file from?

Colonel Brittin: From the—from the general files of the office.

The Chairman: Where were those general files?

Colonel Brittin: Why, I—I don't know where they
96 were; I don't know where the files of MacCracken & Lee are.

The Chairman: Then Lee went out and got them for you, did he?

Colonel Brittin: He either did that or sent for one of the young ladies in the office.

The Chairman: Do you remember which he did do?

Colonel Brittin: No, I haven't a very clear remembrance of that.

The Chairman: Colonel Brittin, are you sure that you were there in the daytime?

Colonel Brittin: Absolutely, sir.

The Chairman: Which day was it that you were there?

Colonel Brittin: I tried to tell Mr. Patterson the other day, when he called me up there. I am not exactly clear as to what particular day, but I know I was there in his

office during regular working hours, in the middle of the day sometime—some time between eleven o'clock in the morning and probably three o'clock in the afternoon.

The Chairman: Did you talk with anybody about going up and getting them, before you went after them?

Colonel Brittin: No.

The Chairman: Did you have any advice to go get them?

Colonel Brittin: No.

The Chairman: Did any lawyer advise you to go and get them?

97 Colonel Brittin: I would like to say, Senator, in answer to that question, I have not consulted counsel on this matter at all, and I have no lawyer here.

Perhaps, if I had, I would not have done it, because, to me, it was a perfectly natural and obvious thing to do, and I did not think that I was doing anything that would be misinterpreted or misunderstood.

The Chairman: To whom were these letters addressed that you took out?

Colonel Brittin: They were purely personal.

The Chairman: To whom were they addressed?

Colonel Brittin: Some of them were to my secretary.

The Chairman: Where?

Colonel Brittin: In St. Paul.

The Chairman: To whom were the others addressed?

Colonel Brittin: Perhaps one or two telegrams, personal memoranda, and I think a couple of letters to my secretary. My secretary handled my personal correspondence for me.

The Chairman: You had an office at that time in Washington, did you not?

Colonel Brittin: I had just established an office.

The Chairman: Where was that office?

Colonel Brittin: At 1090 National Press Building.

The Chairman: Did you have a stenographer there?

Colonel Brittin: I had just employed a stenographer.

The Chairman: When?

98 Colonel Brittin: I guess about ten days ago—perhaps ten or fifteen days ago.

The Chairman: You have not had an office in Washington until ten days ago?

Colonel Brittin: No, sir; I have never had an office in Washington.

The Chairman: Now, these letters were filed in the Northwest Air Express file, were they not?

Colonel Brittin: Northwest Airways file.

The Chairman: Northwest Airways file, in Mr. MacCracken's office?

Colonel Brittin: They were filed there, but they had no business there.

The Chairman: But they were filed in those files?

Colonel Brittin: They were in the folder.

The Chairman: And the title of that folder was Northwest Airways?

Colonel Brittin: I did not look at the title.

The Chairman: Did you see what else was in that file?

Colonel Brittin: Yes. As I went through the file there were quite a few legal opinions on various matters, a legal opinion on the Kelly Bill, a legal opinion on the Comptroller General's rulings on various air mail matters.

The Chairman: There were quite a few letters,
99 also, reporting the progress being made in an effort to get a contract, were there not?

Colonel Brittin: No, not efforts to get a contract, sir. We have a contract.

The Chairman: There were no letters in there with reference to the conference held at the Postmaster General's office?

Colonel Brittin: Yes, there were letters there—my letters to Mr. Howes, my letters to Mr. Cisler, my letters to various Post Office officials.

The Chairman: Were there letters in there with reference to the conference that was held in Washington at the Postmaster General's office?

Colonel Brittin: Which conference was that, please, sir?

The Chairman: When the question came up about dividing up the air mail map.

Colonel Brittin: I do not think so. If you refer to the conference at which the Postmaster General asked all the air mail lines to attend——

The Chairman (interposing): That is the one.

Colonel Brittin: Which he practically requested us to be there. Would you mind giving me the date of that meeting?

The Chairman: I just wanted to know if you saw any correspondence in the file about it.

Colonel Brittin: No, because I only used Mr. MacCracken's office last summer.

100 The Chairman: Did you look over all the files he had on the Northwest Airways?

Colonel Brittin: No, I simply went through them rather casually, just to pick out whatever personal matters there were.

The Chairman: When were those letters written that you say were personal?

Colonel Brittin: Last summer.

The Chairman: To whom else were they written beside your secretary?

Colonel Brittin: Well, as I stated, there were one or two or three telegrams.

The Chairman: To whom?

Colonel Brittin: Personal memoranda.

The Chairman: To whom were these telegrams sent?

Colonel Brittin: To personal friends of mine, Senator; personal matters.

The Chairman: To whom were they?

Colonel Brittin: Is it necessary to answer that?

The Chairman: I think that is necessary to find out what it was you stated you took out.

Colonel Brittin: These were purely personal matters, and I am perfectly willing to do anything you want me to do, but these are personal things, and I wonder if you want to insist on my answering.

The Chairman: They were not seemingly so very
101 personal if you left them up in the files of Mr. MacCracken.

Colonel Brittin: That is perfectly possible, because, when I used Mr. MacCracken's office I was traveling a great deal. I do not reside here in Washington permanently. My home is in St. Paul.

The Chairman: You did not object to their being in there in their files up to the time the Senate Committee sent down there for them, did you?

Colonel Brittin: No. Mr. MacCracken has advised me on some personal matters.

The Chairman: What is that?

Colonel Brittin: I have talked over with Mr. MacCracken some personal matters. At the time he had advised me on one or two purely legal matters that I discussed with him, and I used his office as an address to receive mail when I was in Washington, and I wrote some personal letters from his office, and in my traveling around they got into his files.

The Chairman: You saw in the paper immediately after Mr. MacCracken testified that he stated that he had turned over some files to you, did you not?

Colonel Brittin: Yes, I read that in the newspapers.

The Chairman: Did you then go to see if you could find those files?

Colonel Brittin: Senator, I want to repeat that the only thing I took out——

102 The Chairman (interposing): I know—you have stated that several times.

Colonel Brittin: The six papers.

The Chairman: But did you then go back and make an effort to find those six papers you say you tore up?

Colonel Brittin: No, because that was the next day.

The Chairman: It was the next day after you tore them up that Mr. MacCracken testified he turned them over to you?

Colonel Brittin: I don't know whether it was the next day or two days after. It was not the same day. Anything I would throw in my waste basket on a certain day, of course, would be taken out and cleaned that night.

The Chairman: You tore them up before you put them in the waste basket?

Colonel Brittin: I just tore them up as I would any papers disposed of in that way.

The Chairman: Why didn't you tear them up in Mr. MacCracken's office?

Colonel Brittin: I don't know. It just wasn't the natural thing to do.

The Chairman: You just took them over to your office and immediately tore them up?

Colonel Brittin: I just took them down to my office and tore them up and threw them in the waste basket.

The Chairman: You knew when you got them out

103 that was what you were going to do, tear them up, didn't you?

Colonel Brittin: I don't think I thought very much about it. I just did it because it was a matter of impulse. There was no plan, or anything. It was a personal matter, and they had no place in his files.

The Chairman: Did you save any of them?

Colonel Brittin: No, because they were all personal and all dealt with matters that had transpired.

The Chairman: You knew when you first got them out of the files in Mr. MacCracken's office that the matters were closed up, did you not?

Colonel Brittin: I don't think I thought very much about it at the time. I just went and took them.

The Chairman: Just went and took them, and went directly back to your office. Was there anyone in your office when you got back?

Colonel Brittin: I don't remember whether my secretary was there or not.

The Chairman: Was there anyone else in your office when you tore them up and threw them away?

Colonel Brittin: I don't recall whether my secretary was present or not.

The Chairman: Did you talk to Mr. MacCracken about it any more?

Colonel Brittin: No, sir.

104 The Chairman: Have you talked to him at all about the files that he had?

Colonel Brittin: No, sir.

The Chairman: It was the day after you tore these papers up, was it not, that you wired him that he was at liberty to turn over the files of the Northwest Airways?

Colonel Brittin: I don't remember whether it was the day after or not, but it was—it followed that.

The Chairman: To make it perfectly clear, it was after you went to the office and got these files out and tore them up that you notified Mr. MacCracken that he was at liberty to turn over the files to the Committee?

Colonel Brittin: My telegram reached him subsequent to that.

The Chairman: And you sent it subsequent to that?

Colonel Brittin: I believe I did.

The Chairman: You know you did, don't you?

Colonel Brittin: I believe I did.

(Witness excused.)

Testimony of J. A. Bradley.

(The witness was duly sworn by the Chairman.)

The Chairman: What are your initials, Mr. Bradley?

Mr. Bradley: J. A.

The Chairman: Are you a post office inspector?

Mr. Bradley: Yes, sir.

ments on the part of the Committee on Naval Affairs. Unless some prior commitment may prevent, I should like very much to have the privilege of having the bill laid before the Senate for consideration on next Monday. I am going to ask unanimous consent to that end in legislative session this afternoon.

Mr. Robinson of Arkansas: I think the request ought to be submitted and considered in legislative session. I move that the Senate proceed to the consideration of legislative business.

The motion was agreed to, and the Senate resumed legislative session.

Construction of Naval Vessels

Mr. Trammell: Mr. President, a House bill relating to the building of the Navy to treaty strength reached the Senate 3 days ago. Two important amendments were placed upon the bill on the floor of the House changing very materially the House text in those particulars from the text of the Senate bill which had previously been reported favorably by the Senate Committee on Naval Affairs.

The Senate committee deemed it advisable that those particular features should be given some consideration and that the bill should not be reported immediately to the Senate without giving any thought or consideration whatever to them or to amendments which had been inserted on the floor of the House. Consequently the Senate committee met day before yesterday. We did not reach any agreement then, but met again yesterday and thought we had reached an agreement as to amendments which we wished to suggest, but had to adjourn over until today when we did, after a session of some 2 hours or more, agree upon the amendments which we desired to submit.

The hearing was necessitated not only because certain Members of the Senate felt that the questions involved were of such importance that they should not be passed over with little or no consideration, but it was also requested of the chairman of the committee that the Navy Department be heard upon those particular features of the

bill. We accorded the Department that courtesy. We tried to give some deliberate thought to those important features, one of which was to make a first step toward trying to eliminate the excessive profits which are made out of shipbuilding, and another of which was to endeavor to submit a provision which would require that construction of the vessels to be authorized under this bill shall be apportioned as much as 50 percent to the Government navy yards and 50 percent to the private shipyards of the country. Those are the problems with which we dealt. For that reason we took several days to report back to the Senate this very important measure and these very important features.

Mr. President, I desire to ask unanimous consent, if that is required, that on Monday, upon the convening of the Senate, the unfinished business may be temporarily laid aside and that the Senate proceed to the consideration of House bill 6604, being the bill providing for the building of the Navy to treaty strength.

The Vice President: Is there objection to the request of the Senator from Florida?

Mr. McNary: Mr. President, I do not object to the consideration of the bill in its proper course. However, I am not going to consent to make it a matter of special privilege on Monday. The program has been arranged for Monday. The able Senator from Arkansas [Mr. Robinson] has announced that we will adjourn this evening so that we may have a morning hour on Monday and probably a call of the calendar. The unfinished business of the Senate at this time is in charge of the Senator from California [Mr. Johnson]. If the opportunity occurs on Monday or Tuesday the Senator from Florida may move to proceed to the consideration of his bill.

For these reasons I object at this time to his request.

The Vice President: Objection is heard.

Mr. Trammell: I renew the request for Tuesday.

The Vice President: The Senator from Florida asks unanimous consent for the consideration of the bill on Tuesday. Is there objection?

Mr. McNary: Mr. President, there is no reason why we should start at this time to ask unanimous consent for bills to be considered at some time in the future. The Senator can pursue the course which should be pursued and with

which he is familiar. I shall object constantly to the request.

The Vice President: The Senator from Oregon objects.

William P. M'Cracken.

Mr. Black: Mr. President, I send to the desk a report from the special committee of the Senate acting under Senate Resolution 349 and ask that it may be read.

The Vice President: The clerk will read the report, as requested.

The Chief Clerk read the report (No. 254), as follows:

President of the Senate and the Senate of the United States, Seventy-third Congress:

Your committee, appointed and selected by the Senate under Senate Resolution No. 349, Seventy-second Congress, second session, reports as follows:

(1) The committee has been engaged in public hearings, and did on the 31st day of January 1934 cause to be served on William P. McCracken, of Washington, D. C., a summons, a copy of which is hereto attached, marked "Exhibit A", and which exhibit is made a part of this report.

(2) The said William P. McCracken has appeared before this special committee, but has failed, refused, and declined to bring with him to the committee, or to make available for inspection, his correspondence and memorandums relating to air mail contracts.

(3) The said William P. McCracken has not only failed, declined, and refused to bring such correspondence and memorandums to the committee, or to make it available for the committee's use, but has declined in an open session of the Senate committee, room 318, Senate Office Building, held on January 31, 1934, and has again declined at a public session of the committee, held on February 2, 1934, to bring said papers and correspondence to the committee; and the said Mr. McCracken admitted in open session of the special committee hearing on February 2, 1934, that between the date of the serving of the subpena and the time of his testimony two certain files of correspondence concerning air mail has been removed from his office with his knowledge and consent.

(4) The said William P. McCracken has based his refusal upon the claim that he is an attorney, and as such attorney has a right to determine for himself whether or not cor-

respondence and memorandums with reference to air mail contracts, or what he designates as private and confidential communications, between himself and air mail operators whom he designates as his clients.

(5) The committee makes a report to this Senate and requests that the Senate, by proper resolution, take such action as the Senate deems wise to bring the said William P. McCracken before the bar of the Senate and to require that William J. McCracken produce papers and correspondence herein set out in order that the committee may have available this material evidence to carry out the duties imposed upon your committee by the terms of the resolution under which it is acting.

Respectfully submitted.

HUGO L. BLACK,
Chairman.

(EXHIBIT A.)

United States of America, Congress of the United States.

To William P. MacCracken, Jr., 1152 National Press Building, Washington, D. C.

Greeting: Pursuant to lawful authority, you are hereby commanded to appear before the Senate Committee on Ocean Mail and Air Mail Contracts of the Senate of the United States, on instanter, 1934 at 12 o'clock 30 p. m., at their committee room, 101 Senate Office Building, then and there to testify what you may know relative to the subject matters under consideration by said committee.

Bring all books of account, bank passbooks, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams relating to air mail and ocean mail contracts.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To J. A. Bradley, L. L. Rittelmeyer to serve and return.

Given under my hand, by order of the committee, this 31st day of January, in the year of our Lord one thousand nine hundred and thirty-four.

HUGO L. BLACK,
Chairman Committee on Ocean Mail and Air Mail Contracts.

Service accepted 12:20 p. m. 1/31/34.
WILLIAM P. MACCRACKEN, JR.

Mr. Black: Mr. President, I should like to add that since this report was drawn up, another fact has come to the attention of the committee which would have been placed in the report if it had been known earlier.

106 1876. Congressional Record—Senate. February 2.

Reference is made in the report to the fact that two files have been removed. Those files, according to the evidence, or those parts of the files, were delivered to one Colonel Brittin, of the Northwest Airways, and Mr. Given, as I understand, who is connected with the Western Air Express. An instanter subpena was issued to these two gentlement to bring that correspondence to the committee. Both of them have appeared at the committee room.

The investigator tells me that Colonel Brittin states that he cannot bring the correspondence because he has already destroyed it, making the claim that there was nothing in it except purely unimportant personal matters—a phrase which the committee has heard before.

The other gentleman appeared and stated that the papers he received had been mailed to New York. Of course, we do not know what will happen to the papers that have been mailed to New York. We assume that probably the gentleman who receives them will recognize, if the others have not, that they are part of the evidence which has been desired by the Senate.

The committee has very reluctantly brought this matter to the Senate after having endeavored to obtain the correspondence it desired without coming to the Senate.

In keeping with the request which has been made, I have a resolution which I send to the desk and ask to have read.

The Vice President: The resolution will be read.

The resolution (S. Res. 169) was read, as follows:

Whereas the select committee of the Senate, elected pursuant to Senate Resolution No. 349, Seventy-second Congress, second session, has submitted a report to the Senate; and

Whereas it appears from such report that William P. McCracken, of Washington, D. C., was on January 31, 1934, duly served with a subpena to appear forthwith before such committee, in Washington, D. C., and then and there to testify relative to subject matters, and to produce specified

files, records, and books, pertinent to the matter under inquiry; and

Whereas it appears from such report that the said William P. McCracken has failed, declined, and refused, in disobedience of such subpena, to produce all files, records, and books; and

Whereas the appearance and testimony and correspondence, records, files, and books are material and necessary in order than the committee may properly execute the functions imposed upon it and obtain information necessary as a basis for such legislation as the Senate may deem necessary concerning ocean and air mail contracts: Therefore be it

Resolved, That the President of the Senate issue his warrant, commanding the Sergeant at Arms or his deputy to take into custody the body of the said William P. McCracken before the bar of the Senate and to bring with him the correspondence, memorandums, books, files, and records referred to, and then and there to answer such questions pertinent to the matter under inquiry with reference to facts regarding correspondence, memorandums, books, and files as the Senate may propound, and to keep the said William P. McCracken in custody to await the further action of the Senate.

Mr. Black: I ask unanimous consent for the present consideration of the resolution.

The Vice President: Is there objection? The Chair hears none. The question is on agreeing to the resolution.

Mr. Austin: Mr. President, I wish to make the record clear as to my position in this matter.

I am not persuaded that the law required this witness to obey the subpena, in view of his testimony that the matters which he withheld were communications between him and his professional client with respect to the contracts in connection with which they employed him. Therefore I should not want to have my assent to this resolution interpreted to mean that I assent to that part of the charge upon which the resolution is based, because I believe we are making a precedent here which may guide others in the future.

However, I shall favor the resolution because I regard it a contempt of the Senate of the United States for a witness, pending the decision and action of a Senate special investigating committee upon a question raised by the wit-

ness, to interfere and impede whatever judgment might come out of the consideration of the question he presented by destroying the subject matter.

I merely desire to make this record at the present time.

Mr. White: Mr. President, I desire to say a very brief word about the situation.

I think I am very closely in accord with the views expressed by the Senator from Vermont [Mr. Austin]. The fact is that when this attorney raised the question of privilege, some members of the committee, at least, were in much doubt as to how far that right or that duty of privilege extended; and at the request of some of us—I do not know whether it was at my request or not—the committee gave consideration to the question of privilege. It was pending that consideration of the matter in the committee, before we had reached a settled conclusion as to whether the attorney was or was not obligated to bring the papers before the committee, that some of the papers were permitted to go out of his possession into the hands of his client, and as I now understand, to be ultimately destroyed.

So far as I am concerned, without meaning to express an opinion as to the sound and right principle of law involved, I am free to confess that when this action by the attorney took place I lost in substantial degree my interest in the principle, and I was concerned with the fact that while the matter was under consideration the Senate and the committee of the Senate were, as I viewed it, defied. I am supporting this proceeding because of that, and without intending to indicate my belief or my disbelief as to whether or not there was a privilege.

The Vice President: The question is on agreeing to the resolution.

The resolution was agreed to.

Great Lakes-St. Lawrence Deep Waterway Treaty.

Mr. Lewis: Mr. President, I beg to give notice that on Monday the Chairman of the Foreign Relations Committee, the Senator from Nevada [Mr. Pittman], and I will again ask the Senate to arrive at a date—as immediate a date as possible—for a vote upon the pending treaty that is now under discussion, known as the "St. Lawrence Waterway Treaty."

Mr. Pittman: Mr. President, I simply wish to add to what the Senator from Illinois has stated that no agreement as to the date for a vote has been reached; that he and I are to confer with regard to a date to see whether or not those who are interested in the matter on both sides will sustain us in the matter.

Mr. Lewis: I thought we would submit the matter to the Senate and the Senate itself would agree on a date.

Adjournment to Monday.

Mr. Robinson of Arkansas: I move that the Senate adjourn until 12 o'clock noon on Monday.

The Vice President: The question is on the motion of the Senator from Arkansas.

The motion was agreed to; and (at 4 o'clock and 38 minutes p. m.) the Senate adjourned until Monday, February 5, 1934, at 12 o'clock meridian.

Confirmations.

Executive nominations confirmed by the Senate February 2 (legislative day of January 23), 1934.

To Be Assistant Secretary of Commerce.

Ewing Y. Mitchell.

Registers of Land Offices.

George J. Love to be register of land office at Anchorage, Alaska.

Arthur J. Ewing to be register of land office at Coeur d'Alene, Idaho.

Ira H. Masters to be register of land office at Blackfoot, Idaho.

Thomas F. Corbally to be register of land office at Great Falls, Mont.

Mrs. Mary G. Rose to be register of land office at Carson City, Nev.

William H. Canon to be register of land office at Roseburg, Oreg.

George E. Stone to be register of land office at Spokane, Wash.

107 EXHIBIT I.

United States Senate.

Washington, D. C., February 2, 1934.

To Chesley W. Jurney,
Sergeant at Arms,
United States Senate.

The undersigned, the President of the Senate, by virtue of the power vested in me, hereby command you to forthwith arrest and take into custody and bring to the bar of the Senate, William P. McCracken, together with the correspondence, memorandums, books, files and records pertinent to the matter under inquiry, in pursuance of the following resolution (Senate Resolution 169) this day agreed to:

"Whereas the select committee of the Senate, elected pursuant to Senate Resolution No. 349, 72nd Congress, 2nd Session, has submitted a report to the Senate; and

"Whereas it appears from such report that *William P. McCracken*, of Washington, D. C., was on January 31, 1934, duly served with a subpœna to appear forthwith before such Committee in Washington, District of Columbia, and then and there to testify relative to subject matters, and to produce specified files, records and books, pertinent to the matter under inquiry; and

"Whereas, it appears from such report that the said *William P. McCracken* has failed, declined and refused in disobedience of such subpœnas, to produce all files, records and books; and

"Whereas the appearance and testimony and correspondence, records, files and books are material and necessary in order that the Committee may properly execute the functions imposed upon it and obtain information necessary as a basis for such legislation as the Senate may deem necessary, concerning Ocean and Air Mail contracts: Therefore be it

"Resolved, That the President of the Senate issue his warrant, commanding the sergeant at arms or his deputy, to take into custody the body of the said *William P. McCracken* before the bar of the Senate and to bring with him the correspondence, memorandums, books, files and records referred to and then and there to answer such

questions pertinent to the matter under inquiry with
108 reference to facts regarding correspondence, memorandums, books and files as the Senate may propound, and to keep the said *William P. McCracken* in custody to await the further action of the Senate."

Hereof fail not and make due return of this warrant.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of the United States Senate, this the second day of February, 1934.

(Signed) JNO. N. GARNER,
President of the Senate.

Attest:

(Signed) EDWIN A. HALSEY,
Secretary of the Senate.

109 EXHIBIT J.

1934. Congressional Record—Senate. 1943.

The Presiding Officer: Does the Senator from Nevada yield to the Senator from Illinois?

Mr. McCarran: I yield.

Mr. Lewis: May I ask the honorable chairman of the committee or his efficient aid, the Senator from Nevada, should not the case of a lawyer who stands on his right as a lawyer be separated from the cases of others the charges against whom are based on actual conduct, as related by the honorable chairman of the committee, and, if otherwise uncontroverted, are criminal? Should not the action of the lawyer in assuming within his rights to advise his clients be separated and the question before the Senate as to him as a lawyer be as to his good faith in giving the advice rather than have him commingled in the whole proceeding with the others who do not stand on the relationship at all within the law that the counsel does who advises his clients? I ask would it not be better that the case of Mr. MacCracken be separated from the others and he be heard separately on his legal rights as the adviser of his clients?

Mr. McCarran: I will gladly answer the question of the Senator from Illinois.

Mr. Borah: Mr. President——

The Presiding Officer: Does the Senator from Nevada yield to the Senator from Idaho?

Mr. McCarran: I yield.

Mr. Borah: I was simply going to say I do not see how we can separate these cases because one man is a lawyer, for his entire guilt or innocence before this body depends, in my judgment, upon whether he sought this privilege as a lawyer for the purpose of getting time to enable them to destroy these papers. It is all one transaction. In other words, the gravamen of the offense is the destruction of the papers after notice was served upon them to produce the papers, and it is an offense in that whether the papers were properly to be brought before the committee or not, they were not to be destroyed and good faith required that they be presented to the committee. If Mr. MacCracken sought time in order to enable his clients to destroy these papers, he becomes so identified with the transaction that we cannot separate his case as a lawyer from the cases of the others.

Mr. Lewis: Mr. President, I cannot take issue with the statement of the able Senator from Idaho, but what I wish to press upon the members of the committee is that the conduct referred to by the Senator from Idaho is distinctively criminal rather than being a contempt of the Senate; it is a deliberate crime against the statute; but the lawyer's position, as I gather from the statement, is somewhat different. If, as a lawyer, he stood on his rights to advise his clients from an honest belief on his own part that the papers were protected, I feel that that particular part of his conduct as to whether, as a lawyer, he acted in good faith or not in giving advice, ought to be separated from the other cases so that he might be given an opportunity to disclose his privilege and that we may ascertain his rights as a lawyer within the meaning of the law and the procedure that exempts a lawyer from contempt, if, as counsel, he believes in good faith in the advice he has given to his clients.

Mr. McCarran: Mr. President, in answer to the suggestion of the Senator from Illinois——

Mr. Lewis: I am following what I believe to be the Supreme Court of the United States in the case I handed my able friend from Nevada and the chairman of the committee a moment back.

Mr. McCarran: In reply to the suggestion of the learned Senator from Illinois, there can be no difference in this case.

If there were an honest difference in the first instance and Mr. MacCracken had reason to believe that there might even be a doubt as to his action, he might have had a right to stand on privilege, but he destroyed that right, even if he doubted the question, when he destroyed the evidence that was then held under subpœna in his custody, and he placed himself in the same category with those who wanted to obtain that evidence out of his office, of whom Mr. Hanshue was one and Mr. Brittin was another. Not only that, but he placed himself out of the category under the rule when he, as related by the chairman, collected the very evidentiary matter that should be taken from his office. It was not the agent of Mr. Hanshue who selected that evidence; it was Mr. MacCracken himself, according to the testimony, who selected the individual pieces of evidence and permitted them to be taken away from the office. Therefore, if the learned Senator from Illinois says that the act is criminal as to some but that the attorney might claim his privilege because he was an attorney, it is apparent that he divested himself of privilege because of his own actions.

Mr. Lewis: No, Mr. President; I would only say that there was a dual position, one where he declined to give the committee papers on the ground that they were confidential communications, and the other which was a participation in the act described by the Senator from Nevada and referred to by the Senator from Idaho, which, if true, was a crime deliberate and in violation of the statute and apart from the relation of a lawyer to his client.

Mr. Robinson of Arkansas: Mr. President——

The Presiding Officer: Does the Senator from Nevada yield to the Senator from Arkansas?

Mr. McCarran: I yield.

Mr. Robinson of Arkansas: The Senator from Nevada has indicated his purpose to present a resolution under which all questions pertaining to the issues presented in the committee report may be determined in the presence and hearing and with participation on the part of the accused. I am going to suggest that this is not an appropriate time to discuss the guilt or innocence of the accused of contempt or even to determine what facts or circumstances may constitute guilt or innocence of contempt. The proper proceeding now is for the Senate to determine

whether it wishes to take further steps in the matter, and if so, to issue a citation for the parties and bring them before the Senate, when all questions may then be properly determined.

The Vice President: The Senator from Nevada offers a resolution, which will be read.

The resolution (S.Res. 172) was reduced to writing and was read, as follows:

Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue to show cause why they should not be punished for contempt of the Senate on account of the destruction and removal of certain papers, files, and memorandums from the files of William P. MacCracken, Jr., after a subpena had been served upon William P. MacCracken, Jr., as shown by the report of the Special Senate Committee Investigating Ocean and Air Mail Contracts.

The Vice President: Without objection, the resolution is agreed to.

Mr. Black: Mr. President, in view of the fact that this entire matter is to be taken up on the citation which has just been issued with reference to the individuals named, including Mr. MacCracken, I move that insofar as the previous citation is concerned it simply requires him to appear here and give testimony and that he be released from custody under Senate Resolution 169, adopted on Friday last.

The Vice President: Without objection, the motion is agreed to.

Mr. Black: Mr. President, I should like to suggest that the citation be made returnable on Friday if that is satisfactory to the Senator from Arkansas [Mr. Robinson].

Mr. Robinson of Arkansas: That will be satisfactory to me.

Mr. Black: At what hour would the Senator suggest?

Mr. Robinson of Arkansas: At any hour the Senator desires. I would suggest 12 o'clock.

Mr. Black: Very well.

The Vice President: Without objection, the citation will be returnable at 12 o'clock noon on Friday next.

Mr. Black: There is one other matter that has not been disposed of and upon which, in my judgment, action should

be taken. I ask that the papers which were subpenaed and which are now in the custody of the Sergeant at Arms,

110 1944. Congressional Record—Senate. February 5.

be turned over to the Senate committee investigating ocean and air mail contracts.

The Vice President: Is there objection? The Chair hears none, and it is so ordered.

Message from the House.

A message from the House of Representatives, by Mr. Haltigan, one of its clerks, announced that the House had passed a bill (H.R. 7527) making an additional appropriation to carry out the purposes of the Federal Emergency Relief Act of 1933, for continuation of the Civil Works program, and for other purposes, in which it requested the concurrence of the Senate.

Consideration of the Calendar Tomorrow.

Mr. Robinson of Arkansas: Mr. President, I wish to state, pending consideration of the unfinished business which will be laid before the Senate at this time, that I have consulted the Senator from Oregon [Mr. McNary], and with his approval make the following request for unanimous consent: That on tomorrow, after the conclusion of morning business, the Senate proceed to the consideration of unobjected bills on the calendar.

The Vice President: Is there objection? The Chair hears none, and it is so ordered.

Mr. Lewis: Mr. President, may I inquire of the able leader of the majority if the program authorizes me to say to those Senators who were expecting to speak on the treaty that that matter is postponed under the present arrangement?

Mr. Robinson of Arkansas: The unfinished business is Senate bill 752. The Senate may proceed to the consideration of the St. Lawrence Waterway Treaty at any time it chooses to do so. There has been no definite program as to the time when consideration of the treaty shall be resumed. My suggestion is that Senators should be ready to discuss the treaty whenever the occasion arises.

Mr. Lewis: I am anxious to be released a couple of days if that may be arranged.

Mr. Robinson of Arkansas: I have no authority to release anyone. My assumption is that Senators do not desire to stay away from the Senate, but that they desire to stay here and attend upon its business.

Mr. Lewis: The Senator from Illinois merely desired to know whether the legislative business, to the consideration of which we are at this moment proceeding, would occupy a couple of days. If the Senator has no arrangement contemplating such, I am glad to be so informed.

Mr. Robinson of Arkansas: It is impossible to say how long consideration of the pending bill will be continued. There is no agreement, as the Senator well knows, to limit debate on the bill. It is a controversial measure, and for that reason I would not undertake to make a prophecy as to how long its consideration may require.

House Bill Referred.

The bill (H.R. 7527) making an additional appropriation to carry out the purposes of the Federal Emergency Relief Act of 1933, for continuation of the Civil Works program, and for other purposes, was read twice by its title and referred to the Committee on Appropriations.

Limitation of Jurisdiction of United States District Courts.

The Senate resumed the consideration of the bill (S. 752) to amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to orders of State administrative boards.

Mr. Johnson obtained the floor.

Mr. McNary: Mr. President, I suggest the absence of a quorum.

The Vice President: The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

Adams, Ashurst, Austin, Bachman, Bailey, Bankhead, Barbour, Barkley, Black, Bone, Borah, Brown, Bulkley, Bulow, Byrd, Byrnes, Capper, Caraway, Carey, Clark, Connally, Coolidge, Copeland, Costigan, Couzens, Cutting, Davis, Dickinson, Dieterich, Dill, Duffy, Erickson, Fess,

Fletcher, Frazier, George, Gibson, Goldsborough, Gore, Hale, Harrison, Hastings, Hatch, Hatfield, Hayden, Hebert, Johnson, Kean, Keyes, King, La Follette, Lewis, Logan, Lonergan, Long, McAdoo, McCarran, McGill, McKellar, McNary, Metcalf, Murphy, Neely, Norris, Nye, O'Mahoney, Overton, Patterson, Pittman, Pope, Reed, Reynolds, Robinson, Ark.; Robinson, Ind.; Russell, Schall, Sheppard, Shipstead, Smith, Steiwer, Stephens, Thomas, Utah; Thompson, Townsend, Tydings, Vandenberg, Van Nuys, Wagner, Walcott, Walsh, Wheeler, White.

Mr. Lewis: I desire to announce that the Senator from Florida [Mr. Trammell] is necessarily detained from the Senate.

I regret to announce that the Senator from Virginia [Mr. Glass] and the Senator from Oklahoma [Mr. Thomas] are detained from the Senate on account of illness.

The Vice President: Ninety-two Senators have answered to their names. A quorum is present.

Mr. Johnson: Mr. President, the bill which is now before the Senate is brief in its terms, but of very grave importance to the States that have endeavored to regulate public utilities and, finally, to have a determination as to the justice or injustice of rates which have been fixed. I read the bill so it may be followed, and, very briefly then, I shall endeavor to show some of the reasons which have led us to present it to the Senate. The bill reads as follows:

Be it enacted, etc., That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

Sec. 2. The provisions of this act shall not affect suits commenced in the district courts, either originally or by removal, prior to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered in the same manner and with the same effect as if this act had not been passed.

The design of the measure is to correct what has become an intolerable evil. Those who are familiar at all with the various commissions which the States have set up for the regulation of public utilities and the determination of their rates will realize from their experience that the process is interminable where not only the State courts may be resorted to by the public utility which questions the decision of the State regulatory commission, but the United States courts may be resorted to as well.

The bill takes no substantive right away from the public utility corporations. It enables, of course, the public utility corporation to pursue its remedy through all the courts of the States and ultimately through the United States Supreme Court itself, but it seeks to put the public utility as a litigant in the same category that citizens of the States would be put under like circumstances.

It would seem, from looking at the record of the various cases that have gone to the court of last resort, as if our public utility corporations maintain a circumlocution office the design of which is to rival, in the matter of finality of fixing of rates by the various States, the celebrated case of Jarndyce against Jarndyce.

The bill comes here not from one State, but it comes from many States of the Union. It has the approval practically of every public utility commission of every State that possesses such a commission. It has the approval, too, of those who have had great trouble and great labor and great expense in endeavoring justly to fix the rates of public utility corporations in the different States of the Union.

I have with me letters from different States, all approving the measure, all begging for the relief. I have one from

111 EXHIBIT K.

United States Senate.

To Chesley W. Jurney,
Sergeant at Arms,
United States Senate:

The undersigned, the President of the Senate, by virtue of the power vested in me, hereby command you to forthwith summon William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue to appear before the bar of the Senate in pursuance of the following resolution (S. Res. 172) this day agreed to:

"Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue, to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memoranda from the files of William P. MacCracken, Jr., after a subpœna had been served upon William P. MacCracken, Jr., as shown by the report of the special Senate committee investigating ocean and air mail contracts."

By a further order of the Senate, the above citation is made returnable on Friday, February 9, 1934, at 12 o'clock noon.

Hereof fail not and make due return of this citation.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of the United States Senate, this the 5th day of February, 1934.

(Signed) JNO. N. GARNER,
President of the Senate.

[Seal of the United States Senate.]

Attest:
(Signed) EDWIN A. HALSEY,
Secretary of the Senate.

112 EXHIBIT L.

1934. Congressional Record—Senate. 2209.

transportation system; it would list the great industrial mechanism that has been built up in this country, the

greatest industrial mechanism that the world has even seen; it would list our great agricultural resources.

On the other side of the ledger would be listed the obligation of any society and of any government worthy of the name to assure to every man, woman, and child a decent and a full life. If we will discharge that obligation, if we will balance this greater budget, we will put the operating budget into balance almost at once. Fail to balance it and we can go on with your cheese-paring methods on the regular Budget, but we will never balance it so long as the level of economic activity remains at its present point or goes lower.

This program of necessity requires a tax system which will produce sufficient revenue not to balance the Budget but to maintain Government credit. The tax issue has not been faced yet, but it must be faced, and I hope it will be faced by the Senate at this session of Congress.

We have reached the point, Mr. President, where we must ascertain whether those who give lip service to our present system are willing to pay the price to save it. We must ascertain whether those who have the biggest stake in saving this system are willing to contribute to the Government through graduated income and estate taxes a sufficient revenue to make it possible to carry on these collective expenditures until the war against depression has been won.

To vote down this amendment will bring despair to 4,000,000 men and their dependents who have been lifted up out of the slough of despond and given the chance to resume their places as respected citizens. The defeat of this amendment and the rapid abandonment of civil works which must follow will mean the end of an activity chiefly responsible for averting another collapse.

Investigation of Air and Ocean Mail Contracts—William P. M'Cracken et al.

During the delivery of Mr. La Follette's speech,

Mr. Black: Mr. President——

The Vice President: Will the Senator from Wisconsin yield to the Senator from Alabama for the purpose of enabling him to present an order prescribing the procedure tomorrow?

Mr. La Follette: Certainly; I gladly yield to the Senator for that purpose.

Mr. Black: Mr. President, from the Special Committee to Investigate Air and Ocean Mail Contracts, I report the order which I send to the desk and which I ask the Senate to adopt. It has reference to the proceedings tomorrow in connection with the citations for contempt. I desire to state that the order has been carefully gone over by each individual member of the special committee, and has been unanimously approved by the committee. I request that the order be read, and I ask for its adoption.

The Vice President: The clerk will read the order submitted by the Senator from Alabama.

The legislative clerk read as follows:

Ordered, That in the matter of William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue, on an order to show cause, the mode of procedure and rules shall be as follows:

When the respondents shall present themselves at the bar of the Senate in obedience to the order of February 5, 1934, the Presiding Officer shall address them as follows:

"_____,
"_____,
"_____,
"_____.

"You have been brought before the Senate, by its order, to show cause why you should not be punished for contempt of the Senate on account of the destruction and removal of certain papers, files, and memoranda from the files of William P. MacCracken, Jr., after a subpena requiring the production of such papers, files and memoranda had been served upon William P. MacCracken, Jr., as shown by the report of the Special Committee on Investigation of Air Mail and Ocean Mail Contracts."

The clerk shall then read Senate Report 254, Seventy-third Congress, second session, parts 1 and 2, submitted February 2 and 5, 1934, respectively, and Senate Resolution 172, agreed to February 5, 1934; after which the Presiding Officer shall address to each of the respondents the following question:

"Have you anything to say in excuse or extenuation of your connection with or participation in the matters described in such report and resolution?"

If the respondent shall answer, or fail to answer, they shall continue at the bar of the Senate until all the testimony in the proceedings (if any be adduced) shall be closed and then they shall retire while the Senate in closed executive session deliberates on the case; and when a decision is agreed upon the respondents shall, being previously notified of the time by the Sergeant at Arms or by a written notice left at their office or residence, appear at the bar of the Senate, in open session, and the Presiding Officer shall pronounce to them the decision.

The respondents shall be allowed the assistance of counsel while personally attending at the bar of the Senate, who, subject to the limitations hereinafter set forth, may be heard with respect to any matters charged against said respondents.

Counsel shall be limited to examination of respondents and other witnesses and to argument.

The respondents shall be permitted to summon such witnesses to testify to matters pertinent to the issue as the Senate may think proper.

Counsel for the respondents and members of the Special Committee on Investigation of Air Mail and Ocean Mail Contracts shall be permitted to question respondents and witnesses orally; but no question shall be put by or at the request of any Senator not a member of the committee until completion of the examination by counsel and members of the committee, or by counsel if a witness is called by the Senate, until completion of the examination by the members of the committee.

After the completion of such examination by counsel and the members of the committee, if a Senator other than a member of the committee wishes a question to be put to a respondent or witness the question shall be reduced to writing and put by the Presiding Officer, but if any question put or any testimony offered shall be objected to by any member of the committee or by counsel, the member of the committee or counsel so objecting shall be heard briefly thereon and counsel or any member of the committee shall be heard briefly in reply thereto, after which the matter shall be decided by the Presiding Officer without further debate, unless a Senator or counsel shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or the Presiding Officer may at

his option in the first instance submit any such question to a vote of the Senate.

Counsel for the respondents and Members of the Senate shall, subject to the foregoing limitations, have full opportunity to examine, cross-examine, and reexamine any respondent or witness with respect to any matter raised by any question.

All testimony shall be taken on oath or affirmation.

In all particulars not covered by the foregoing, the proceedings shall be governed by the Standing Rules of the Senate.

Mr. Johnson: Mr. President, I should like to make an inquiry of the Senator from Alabama. At the beginning of the resolution, I observe that a portion of the proceedings are to be had in closed executive session. Would the Senator mind stating the reason for that procedure?

Mr. Black: Mr. President, the evidence is to be taken in open session; the arguments are to be made in open session. The closed session to which the Senator refers is with reference to the deliberations of the Senate after the evidence has been given and the arguments have been heard.

The Senator will recall that this was the method which was followed in connection with the recent impeachment case, and, so far as I know, is the method that has been followed with reference to the deliberations of the Senate in connection with reaching a decision in such cases. That is the reason why it is suggested that this particular portion of the proceedings be held in closed session.

Mr. Johnson: Mr. President, I am not seeking to make any captious objection to the procedure that is suggested, but I did not understand the theory upon which a closed executive session was to be held. I take it, however, now, from what the Senator says, that it is merely for the deliberations subsequently of the Senate?

Mr. Black: It is exactly in line with the ordinary proceeding of a jury after the evidence has been given and the argument has been heard.

The Vice President: Is there objection?

Mr. Norris: Mr. President, I am not going to object or even vote against the proposal. The question I wanted to ask the Senator from Alabama has already been asked by the Senator from California. I only had that in view.

I believe a mistake is being made. I think the deliberations of the Senate ought to be in the open. I think it will demand more respect and more consideration from the people of the country if all our deliberations are in the

113 2210. Congressional Record—Senate. February 8.

open. Unless there is some very good reason to the contrary, I hope the Senator from Alabama will change the order in that respect, although if he does not feel authorized to do so by reason of the action of the committee I shall make no further objection.

Mr. Robinson of Arkansas: Mr. President, taking note of what has just been said by the Senator from Nebraska, I desire to express my opinion that the Senate special committee has acted wisely in incorporating in its order of procedure the provision referred to. If, after the evidence has been submitted and the arguments have been heard, 96 Senators proceed in open session to deliberate upon a decision, there will result, in my judgment, such confusion as will occasion delay and embarrassment and tend to prevent the successful conclusion of the deliberations of the Senate.

It is not contemplated that there shall be any proceedings in closed executive session, except insofar as they relate to the efforts of the Senators, 96 in number, to agree upon a conclusion.

Mr. La Follettee: Mr. President——

The Vice President: Does the Senator from Arkansas yield to the Senator from Wisconsin?

Mr. Robinson of Arkansas. I am glad to yield to the Senator from Wisconsin.

Mr. La Follette: May I ask whether the Senator contemplates that after deliberation in executive session the Senate would then go into open session for the purpose of registering its decision?

Mr. Robinson of Arkansas. Oh, certainly. That is the provision in the order.

Mr. Johnson rose.

Mr. Robinson of Arkansas. The only proceedings in closed session, as contemplated by the arrangement, have reference to the deliberations of the Senate. If a jury, or, for that matter, a board of arbitration, in attempting to reach a conclusion, should hold their proceedings in open

session, there would undoubtedly be influences brought to bear to stimulate obstructions which might prevent agreement.

I yield to the Senator from California.

Mr. Johnson: I was merely going to ask the Senator—and he answered it in the latter part of his statement—if he likened the proceedings to one of trial by jury, where the jury retire and in executive session determine their verdict.

Mr. Robinson of Arkansas. Yes, exactly; and that is the sole effect of the provision in the order to be entered relating to the proceedings of the Senate. All other proceedings are in the open, and properly so. Full opportunity is given not only to representatives of the respondents to ask any questions they desire but also to Senators generally after the members of the committee have had the opportunity of submitting their questions. The reason for that provision suggests itself. It is to avoid the confusion which inevitably arises when a large number of Senators seek to obtain the floor at the same time.

The Vice President: Is there objection to the entering of the order?

Mr. Norris: Mr. President, I want to be heard briefly, not with the intention of trying to change any votes, but for the purpose of leaving the record——

Mr. La Follette: Mr. President, if this is going to lead to any extended debate, I would prefer that the Senator from Alabama should take up the matter when I shall have concluded my remarks.

Mr. Robinson of Arkansas. I do not understand that the Senator from Nebraska expects to prolong the debate.

Mr. Norris: I do not.

Mr. La Follette: I shall be very happy to hear the Senator on the subject, but I would like to conclude my remarks.

Mr. Norris: I will simply say, then, that I am still not convinced—and I believe I can convince any honest man if I had the opportunity to do so—that the proceedings ought to be in the open all the way through.

The Vice President: Is there objection? The Chair hears none, and the order is entered.

Prices and Marketing of Sugar (H. Doc. No. 246)

After the conclusion of Mr. La Follette's speech,

The Vice President laid before the Senate a message from the President of the United States, which was read, referred to the Committee on Finance, and ordered to be printed as follows:

To the Congress:

Steadily increasing sugar production in the continental United States and in insular regions has created a price and marketing situation prejudicial to virtually everyone interested. Farmers in many areas are threatened with low prices for their beets and cane, and Cuban purchases of our goods have dwindled steadily as her shipments of sugar to this country have declined.

There is a school of thought which believes that sugar ought to be on the free list. This belief is based on the high cost of sugar to the American consuming public.

The annual gross value of the sugar crop to American beet and cane growers is approximately $60,000,000. Those who believe in the free importation of sugar say that the 2 cents a pound tariff is levied mostly to protect this $60,000,000 crop and that it costs our consuming public every year more than $200,000,000 to afford this protection.

I do not at this time recommend placing sugar on the free list. I feel that we ought first to try out a system of quotas with the threefold object of keeping down the price of sugar to consumers, or providing for the retention of beet and cane farming within our continental limits, and also to provide against further expansion of this necessarily expensive industry.

Consumers have not benefited from the disorganized state of sugar production here and in the insular regions. Both the import tariff and cost of distribution, which together account for the major portion of the consumers' price for sugar, have remained relatively constant during the past 3 years.

This situation clearly calls for remedial action. I believe that we can increase the returns to our own farmers, contribute to the economic rehabilitation of Cuba, provide adequate quotas for the Philippines, Hawaii, Puerto Rico, and the Virgin Islands, and at the same time prevent higher prices to our own consumers.

The problem is difficult but can be solved if it is met squarely and if small temporary gains are sacrificed to ultimate general advantage.

The objective may be attained most readily through amendment of existing legislation. The Agricultural Adjustment Act should be amended to make sugar beets and sugar cane basic agricultural commodities. It then will be possible to collect a processing tax on sugar, the proceeds of which will be used to compensate farmers for holding their production to the quota level. A tax of less than one-half cent per pound would provide sufficient funds.

Consumers need not and should not bear this tax. It is already within the Executive power to reduce the sugar tariff by an amount equal to the tax. In order to make certain that American consumers shall not bear an increased price due to this tax, Congress should provide that the rate of the processing tax shall in no event exceed the amount by which the tariff on sugar is reduced below the present rate of import duty.

By further amendment to the Agricultural Adjustment Act, the Secretary of Agriculture should be given authority to license refiners, importers, and handlers to buy and sell sugar from the various producing areas only in the proportion which recent marketings of such areas bear to total United States consumption. The average marketings of the past 3 years provide on the whole an equitable base, but the base period should be flexible enough to allow slight adjustments as between certain producing areas.

The use of such a base would allow approximately the following preliminary and temporary quotas:

114 EXHIBIT M.

Washington, D. C., February 9, 1934.

To the Senate of the United States:

On February 6, 1934, I received from the Sergeant at Arms of your honorably body a citation to appear before the bar of the Senate on this 9th day of February, 1934, to show cause why I should not be punished for contempt of the Senate on account of the alleged destruction and removal of certain papers from my files after a subpoena had been served upon me "as shown by the report of the

Special Senate Committee investigating ocean and air mail contracts".

I have the greatest respect for the Senate of the United States and would not knowingly or intentionally commit any act in contempt of its constitutional rights and powers. I am constrained, however, to deny the constitutional right of your honorable body to compel the attendance before its bar of a private citizen of the United States to there show cause why he should not be punished for an alleged past and completed act.

The Supreme Court of the United States has distinctly held that while each House of the Congress has implied power to deal directly with contempt so far as is necessary to preserve and exercise the legislative authority expressly granted, this being a power of self-preservation, a means and not an end, the power does not extend to infliction of punishment, as such. It is, the highest judicial tribunal of our Nation has held, a power to *prevent* acts which in and of themselves, inherently, prevent or obstruct the discharge of legislative duty, and to *compel the doing* of those things which are essential to the performance of the legislative functions. That Court has clearly announced the constitutional principle that punishment for completed acts is exclusively a judicial function, and not a legislative one.

To appear at the bar of the Senate in response to the above mentioned citation would be to give assent to the exercise by your honorable body of powers which do not constitutionally belong to it and to voluntarily aid in permitting it to violate rights guaranteed to me as a citizen of the United States under the Constitution of my country. This I respectfully decline to do.

On January 31, 1934, the Senate Committee on Ocean and Air Mail Contracts by its subpoena commanded me to appear before it "instanter" and to "bring all books
115 of account, bank pass books, cancelled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air mail and ocean mail contracts".

Compliant to that subpœna I appeared before your Committee on the date of its issue and on that date I produced and made available to said Committee, to the best of my ability, knowledge, information and belief, all papers in my possession in any way relating to air mail and ocean

mail contracts, except those which under the law, as I understood it and as I was advised respecting it by counsel whom I had consulted, I was not lawfully at liberty to produce, because of the privilege which attached to them as communications between attorney and clients.

I made known to your Committee the privilege of my clients in good faith and, I repeat, after having sought advice of counsel who at the time had no connection with or interest in the clients of mine whose papers were concerned.

I made known to your Committee the name of every client of mine who had air mail contracts, and the fact that I had no clients who, known to me, had ocean mail contracts. At the Committee's request, immediately following my appearance before it, I communicated with all of my clients, who were concerned, by telegraph, informed them of the subpoena, told them that the Committee had requested me to inquire whether they waived their privilege and authorized me to make the documents available to the Committee, and asked for telegraphic advice of their decision. The telegrams thus sent to my clients were, before they were sent, submitted to your Committee's Chairman and by him approved. A true copy of said telegrams appears in the record of the proceedings before your Committee on February 2, 1934.

On February 1, 1934, I again communicated by telegraph to such of my clients as had not promptly responded to my first telegram and urged them to expedite their decision and their advice to me with respect to their waiving the privilege referred to. A copy of this second telegram also appears in the record of your Committee's proceedings of the 2nd instant.

I recognize the power and right of your Committee to issue the above mentioned subpœna and to compel my attendance before the Committee as a witness, and to compel the production of relevant and material documents, to the extent that I could lawfully produce them without my clients' consent.

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Late in the afternoon of February 2, 1934, the Sergeant at Arms of the Senate took me into custody, compliant to the command of an order or warrant issued by the President of the Senate directed to its Sergeant at Arms, pursuant to Senate Resolution 169 of this session. When said

warrant was served the Senate had adjourned to reconvene on Monday, February 5th, at noon, and my appearance at that time under said warrant was arranged for.

Immediately prior to the service of that warrant I had received from all of my above mentioned clients waivers of their privilege and consent to the production by me of all papers in my possession relating to their air mail contracts. Had those waivers and consents not been communicated to me I would not have been lawfully able to comply with the commands of the aforesaid warrant and would have sought release from arrest thereunder by judicial process. The privilege having been waived and no lawful reason being any longer in existence to require my declining to produce any document called for in the aforesaid subpœna and warrant, I produced all of the same, to the best of my ability, knowledge and belief, under the subpœna's command, and they were taken into the custody of your Sergeant at Arms under the pretended authority of the aforesaid warrant.

The Senate's warrant of February 2, 1934, quoting Resolution 169 adopted that date, set forth that "the appearance and testimony and correspondence, records, files and books" called for by the Committee's subpœna "are material and necessary in order that the Committee may properly execute the functions imposed upon it and obtain information necessary as a basis for such legislation as the Senate may deem necessary". And the command of the warrant was that I be brought before the bar of the Senate together with "the correspondence, memorandums, books, files and records referred to and then and there to answer such questions pertinent to the matter under inquiry with reference to facts regarding correspondence, memorandums, books and files as the Senate may propound."

The privilege above referred to having been waived by those who alone had the power to waive it, I recognized
117 that the legislative purpose declared by, and the inquiries sought to be had as set forth in, the above quoted portions of the Senate's warrant, were within the constitutional power of your honorable body, and I was ready to appear and to submit to whatever examination the Senate deemed appropriate in the premises.

I do not deny, but freely concede, the right and power of the Senate, or its committees thereunto authorized, to com-

pel the attendance of witnesses, the giving of pertinent testimony, and the production of material documents. Likewise, and as freely, I concede the Senate's power to commit a recalcitrant witness to custody until, but no longer than, he agrees to, and does, testify or produce documents as lawfully required.

With the assistance of counsel I had prepared, and was ready to deliver to the Senate at its bar on the 5th instant, the following response:

"Washington, D. C., February 5, 1934.

"Statement of William P. Mac Cracken, Jr., to the Senate of the United States in Response to Warrant of February 2, 1934.

"Mr. President:

"As stated in the report of your Committee appointed under Senate Resolution No. 349, 72nd Congress, Second Session, there was served on me January 31, 1934, subpœna, copy of which is attached to the Committee's report, marked Exhibit A, which copy is printed on page 1875 of the Congressional Record, proceedings of February 2, 1934.

"In response to that subpoena I appeared as a witness before the Senate Committee on Ocean Mail and Airmail Contracts and offered to produce for the examination and use of that Committee all documents in my possession relating to ocean and airmail contracts which under the law, as I understand it, I was then at liberty to produce.

"I am an attorney at law; as such I was retained by several corporations having contracts with the United States for the carriage of mail by airplanes. Among the papers relating to airmail contracts in my possession were communications from my clients to me. I understand the law to be that an attorney cannot produce or disclose any communication, relating to the matter in connection with which he is employed, made to him by a client. I understand further that this is not a privilege of the attorney, but a restriction upon him; that the privilege belongs exclusively to the client. I respectfully so informed the Committee. At the Committee's request I communicated with all of my clients concerned by telegraph, informed them of the subpœna, told them the Committee had requested me

to inquire whether they waived their privilege and authorized me to make the documents available to the Committee, and asked for telegraphic advice of their decision. The telegrams thus sent to my clients were, before they were sent, submitted to your Committee's Chairman and by him approved.

"My files were not subpœnaed. Nor were my office files. Nor was any subpœna issued for all of the papers in, or the entire contents of, my files. I have no such thing in my office as an airmail or ocean mail contract file. Folders in my firm's files which pertain to the business of clients
118 who have or have had airmail contracts frequently contain papers in no way relating to the subject of such contracts. Before replying to my request for instructions regarding the production of papers relating to air mail contracts, which the Committee's subpœna called for, three of my clients requested an opportunity to examine the files containing such papers.

"One of these requests did not come to me and I had no knowledge of it until after it had been made and acted upon by my partner. As to each of these requests the facts are as follows:

"1. One made by Colonel L. H. Brittin of the Northwest Airways, Inc., did not come to me nor did I have any knowledge of it until after it had been made and acted upon. Colonel Brittin had used my firm's office last summer for his own purposes and had while there, I am informed, dictated several personal letters, which, I am further informed, had no relation to air mail and ocean mail contracts. I have no personal knowledge respecting such papers and therefore speak of them on information. Before answering the above referred to request, Colonel Brittin requested my partner to permit him to look at the files and, I am told, took therefrom his personal papers which were in no way affected by or subject to the Senate Committee's subpœna.

"2. Mr. Harris M. Hanshue, President of the Western Air Express, was sent one of the telegraphic requests to which I have referred. Before giving his consent to the production of papers relating to airmail contracts he informed me, by telephone, that he intended to send his secretary to my office to look over the papers in our files and to obtain therefrom some purely personal papers of his.

Subsequent to that telephone message Mr. Gilbert Givven, Mr. Hanshue's secretary, telephoned me that he was coming to my office pursuant to Mr. Hanshue's instructions. He came and I saw him personally. I produced for him the files and he took therefrom certain papers. At a hearing before your Committee on the 2nd instant I informed the Committee that I would use my best efforts to have those papers returned and they have since, I am informed, all been produced by Mr. Givven and delivered to your Committee. Through inadvertence, and without my knowledge, I have been informed since the 2nd instant, some papers the contents of which do relate to airmail contracts were included among the papers taken by Mr. Givven as personal papers of Mr. Hanshue. These, and, I am informed and believe, all papers which Mr. Givven took from my office, are, I repeat, now in the possession of your Committee. Immediately after my appearance before the Committee on the 2nd I exerted, as I promised the Committee I would do, my best efforts to have those papers returned.

"3. Mr. Francis Scheetz, general counsel of the Ludington Air Lines, Inc., one of the companies to whom I sent the above referred to telegram, informed me that he felt that his duty to his client required that he should inspect the papers relating to his client before giving his advice as to whether the Company should or should not waive its privilege in connection with those papers. Mr. Scheetz came to my office for that purpose on the 2nd instant. He did not however inspect any of the papers in my office and his Company has consented to their production.

"Prior to the presentation to the Senate of the Committee's report on February 2nd I had received waiver of their privilege from five of nine clients concerned; had communicated that fact to the Committee; had produced all documents comprehended within the description of the Committee's subpœna, under that subpœna, which concerned the clients who had waived their privilege and consented to such production; and had communicated with the four clients who had not answered my earlier telegrams urging them to expedite their decision and instructions to me.

"At about the time that this honorable body ordered the issuance of its warrant, I had received instructions
119 from the four clients who up to the time of my last appearance before the Committee on February 2nd

had not given me instructions, to the effect that they also waived any privilege pertaining to documents in my possession and consenting to my producing the same under the Committee's subpœna. I received the last of these instructions shortly prior to the service by your Sergeant-At-Arms of the warrant. As my clients informed me of their decision in the premises I promptly communicated the same to the Chairman of your Committee and to investigators employed by it.

"There have now been produced, compliant to the command of the Committee's subpœna and the Senate's warrant, to the best of my ability, knowledge and belief, all documents and records in my possession relating to airmail and ocean mail contracts.

"I have twice appeared, compliant to the demand of your Committee's subpœna, before the Committee, and I have never refused to answer any question propounded to me by any member thereof.

"I have the greatest respect for the Senate of the United States and have at no time had any desire to disobey its processes or to appear to be in contempt of its authority.

"There having been produced the documents which the Committee's subpœna and the Senate's warrant commanded the production of, and I having answered all questions propounded to me, and being ready to answer all material and pertinent questions which may be propounded by this honorable body or its Committee, I respectfully ask to be discharged from custody of the Sergeant at Arms of the Senate.

(Signed WILLIAM P. MacCRACKEN, JR."

Although the Sergeant at Arms reported that I was in his custody, I was neither required nor permitted to appear before the bar of the Senate on the 5th instant, but after proceedings were had in the Senate on a report submitted by the Special Committee, I was, by vote of the Senate, ordered to be released from custody, and was thereupon forthwith released.

Your Special Committee had in its possession every document, of which I then had any knowledge, covered by its subpœna. I have at no time refused to answer any question propounded to me by the Committee. As fast as I received waivers, and consents to the production of privileged communications, I advised the Chairman of your Committee

thereof and made available, under the subpœna, all documents which it called for.

Since the 5th instant some few papers relating to air mail contracts of a former client, dating back to matters occurring about seven years ago, have been found and produced for the Committee, under the subpœna.

Not having been discharged from my obligation to again appear as a witness under the Committee's subpœna, but having, as I understand, been only temporarily ex-
120 cused from attendance thereunder, I stand ready at any and all times required to appear and testify fully in respect of any matters pertinent and material to the subject of the Committee's inquiry.

Being advised, and convinced, that the Senate's citation, the proposed trial of myself at its bar, and the assertion of power by it to punish me for an alleged consummated offense, are each and all beyond its constitutional powers, and are, on the one hand, an invasion of the functions delegated by the Constitution exclusively to the judicial power, and, on the other, a plain violation of my constitutional rights, I am, with great regret, forced to deny the now asserted right of your honorable body in the premises, and to seek protection under the Constitution in the Courts.

Yours very respectfully,

WILLIAM P. MacCRACKEN, Jr.

121 Filed February 12, 1934.

In the Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MacCRACKEN, JR., Petitioner.

Demurrer to Petition.

Now comes the respondent by Leslie C. Garnett, United States Attorney and Harry L. Underwood, Assistant United States Attorney, his attorneys, and demurs to the petition for habeas corpus filed herein, and says that the same is insufficient in law.

LESLIE C. GARNETT,
United States Attorney,
HARRY L. UNDERWOOD,
Assistant United States Attorney.

Points to be argued:

1. On this application for a writ of habeas corpus, the hearing is confined to the single question of the jurisdiction of the tribunal under whose authority the petitioner is held, and the hearing is not in the nature of a writ of error, nor is it intended as a substitute for the functions of a trial court.

2. The petition on its face shows that the Senate was exercising a legislative function in subpœnaing petitioner and requiring him to produce documents before it and, therefore, the jurisdiction of the Senate is undisputed.

3. The Senate, where the particular act interferes with its legislative functions, has power in preservation of its functions, without a resort to judicial proceedings under the general criminal law, to exercise its authority to punish for contempt, even though the act complained of has been committed.

122 In the Supreme Court of the District of Columbia.

Writ of Habeas Corpus.

No. 1714.

In the Matter of the Petition for Writ of Habeas Corpus for WILLIAM P. MACCRACKEN, JR.

The President of the United States to Chesley W. Jurney, or to such other person or persons as may have your petitioner in custody, Greeting:

You are hereby commanded to have the body of William P. MacCracken, Jr., detained under your custody, as it is said, together with the day and cause of his being taken and detained, by whatever name he may be called in the same, before the Honorable Daniel W. O'Donoghue, one of the Justices of the Supreme Court of the District of Columbia in the United States Courthouse, city of Washington (immediately) after the receipt of this writ, do and receive whatever shall then and there be considered of in his behalf, and have then and there this writ.

ALFRED A. WHEAT.

Witness, The Honorable Chief Justice of said Court the 12" day of February, A. D. 1934.

[SEAL.] FRANK E. CUNNINGHAM,
Clerk.

By HARRY M. HULL,
Assistant Clerk.

Marshall's Return.

Served the within named "Chesley W. Jurney" Personally 2/12/34.

EDGAR C. SNYDER,
U. S. Marshal in and for the District of Columbia,
By J. J. CLARKSON,
Deputy U. S. Marshal.

123 In the Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MACCRACKEN, JR., Petitioner.

Order.

Filed Feb. 12, 1934.

The respondent, Chesley W. Jurney, Sergeant at Arms of the Senate of the United States, having produced before the Court the body of the petitioner, William P. MacCracken, Jr., in obedience to the writ of habeas corpus issued herein, this cause came on to be heard on the petition and demurrer of the respondent to the sufficiency thereof, and was argued by counsel for the respective parties herein and submitted to the Court:

Upon consideration whereof, it is by the Court this 12th day of February, 1934,

Ordered that the said William P. MacCracken, Jr., be, and he is hereby, remanded to the custody and control of the respondent and the writ of habeas corpus be, and it is hereby, discharged and the petition dismissed.

DANIEL W. O'DONOGHUE,
Justice.

The petitioner in open Court noted an exception to the foregoing order and said exception was allowed by the Court, and the petitioner in open Court notes an appeal to the Court of Appeals, and the penalty of his bond for costs in said appeal is fixed in the sum of $100.00, or in lieu of said bond he may deposit the sum of $50.00 in the Clerk's Office. Thereupon petitioner, by his counsel, applied to the Court for bail, and said application was denied by the Court. The petitioner, by his counsel, thereupon noted an exception, which was allowed by the Court, to the Court's refusal to grant him bail.

DANIEL W. O'DONOGHUE,
Justice.

124 *Memorandum.*

February 14, 1934.—$50 deposited by F. J. Hogan for petitioner in lieu of bond on appeal.

125 In the Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MACCRACKEN, JR., Petitioner.

Assignment of Errors.

Filed February 14, 1934.

Now comes William P. MacCracken, Jr., the petitioner in the above-entitled cause, by his attorneys herein, and says that in the judgment and proceedings in said cause there are manifest errors, and that in its decision and judgment in the above-entitled cause the trial court erred in the following particulars and respects, to wit:

(1) In sustaining the demurrer of the respondent to the petition for writ of habeas corpus.

(2) In declining to discharge petitioner from the custody of respondent upon the writ of habeas corpus.

(3) In discharging the writ of habeas corpus and remanding petitioner to the custody of the respondent.

(4) In dismissing the petition for writ of habeas corpus.

(5) In failing to hold that petitioner was unlawfully restrained of his liberty by respondent in violation of his rights under the Constitution of the United States, and

particularly in violation of Article III, Section 2 thereof; and in violation of the Fourth Amendment thereof, providing that no warrant shall issue except upon probable cause supported by oath or affirmation; and in violation of the Fifth Amendment thereof, and particularly the provision thereof that no person shall be deprived of liberty without due process of law; and in violation of the Sixth Amendment thereof, and particularly the provision thereof that in all criminal prosecutions the accused shall enjoy the right to trial by an impartial jury.

(6) In failing to hold that petitioner was unlawfully restrained of his liberty by appellee in violation of his rights under Article III, Section 2, of the Constitution of the United States, defining the judicial power of the
126 United States, and by an attempted exercise of said judicial power by persons who were not judges or members of the judicial department of the Government to whom the exercise of said judicial power is limited.

(7) In not holding that under the circumstances of the case, the issue of the warrant of arrest and the arrest and detention of petitioner thereunder and the deprivation of his liberty were and each of them was abuse of process.

(8) In not finding and holding that the arrest and detention of petitioner were punitive measures not warranted by or reasonable under the circumstances of the case.

(9) In not ordering the detention of petitioner ended and appellant set at liberty.

(10) In failing to hold that the warrant caused to be issued by the Senate for petitioner's arrest was beyond the Constitutional powers of the Senate.

(11) In failing to hold that the assertion and exercise of power by the Senate in causing the arrest of petitioner were, and each of them was unnecessary and arbitrary, and was an invasion of the rights guaranteed petitioner by the Fifth Amendment to the Constitution of the United States that he should not be deprived of his liberty without due process of law.

(12) In failing to hold that the Senate was without lawful authority under the Constitution and laws of the United States to try or punish petitioner for the alleged offense set forth in Senate Resolution 172.

(13) In not holding that the warrant caused to be issued by the Senate for the arrest of petitioner, and all proceedings thereunder, were illegal and void.

(14) In not holding that the proceedings under Senate Resolution 172 were proceedings within the jurisdiction of the courts, and especially of the Grand Jury and not within the constitutional function of the Senate.

(15) In not holding that the proceedings directed by Senate Resolution 172 were beyond the constitutional powers of the Senate because there was no subject or purpose of legislation avowed thereby and none was
127 disclosed or indicated by the terms thereof, and none was apparent from the subject-matter thereof.

(16) In failing to hold that the Senate was without constitutional and lawful authority to cause the issue of the warrant of arrest under which petitioner was deprived of his liberty.

(17) And for other errors apparent of record.

FRANK J. HOGAN,
EDMUND L. JONES,
Attorneys for Petitioner.

Service of a copy of the foregoing assignment of errors acknowledged this 14th day of February, 1934.

LESLIE C. GARNETT,
Attorney for Respondent.

128 In the Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MACCRACKEN, JR., Petitioner.

Designation of Record.

Filed February 14, 1934.

Now comes William P. MacCracken, Jr., appellant in the above-entitled cause, and designates the parts of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, viz:

1. Petition for writ of habeas corpus, together with all exhibits appended thereto and made a part thereof.
2. Writ of habeas corpus.
3. Demurrer of appellee.

4. Order discharging writ, dismissing petition and remanding appellant to custody of appellee, together with notations on foot of said order showing exceptions taken by appellant, and noting of appeal in open court, and fixing of bond or cash deposit in lieu thereof.
5. Memorandum of making cash deposit.
6. Assignment of errors.
7. This designation.

FRANK J. HOGAN,
EDMUND L. JONES,
Attorneys for Petitioner.

I hereby acknowledge, this 14th day of February, 1934, service of a copy of the foregoing designation.

LESLIE C. GARNETT,
Attorney for Respondent.

129 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 128, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, In the Matter of William P. MacCracken, Jr., Habeas Corpus No. 1714, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 14th day of February, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6166. William P. MacCracken, Jr., appellant, vs. Chesley W. Jurney. Court of Appeals, District of Columbia. Filed Feb. 15, 1934. Henry W. Hodges, Clerk.

(4608-C)

Monday, May 7, A.D. 1934

* * * * * * *

No. 6166

WILLIAM P. MacCRACKEN, JR., APPELLANT

v.

CHESLEY W. JURNEY

The argument in the above-entitled cause was commenced by Mr. Frank J. Hogan, attorney for appellant, and was continued by Mr. Leslie C. Garnett, attorney for appellee, and was concluded by Mr. Frank J. Hogan, attorney for appellant.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6166

WILLIAM P. MacCRACKEN, JR., APPELLANT

v.

CHESLEY W. JURNEY, APPELLEE

Appeal from the Supreme Court of the District of Columbia

(*Argued May 7, 1934. Decided July 9, 1934*)

Frank J. Hogan and *Edmund L. Jones*, both of Washington, D.C., for appellant.

Leslie C. Garnett, United States attorney, and *Harry L. Underwood*, assistant United States attorney, for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices.

ROBB, *Associate Justice:* Appeal from an order in the Supreme Court of the District, on a petition for writ of *habeas corpus* filed by appellant (hereinafter designated as petitioner) and the demurrer of appellee (hereinafter designated as respondent) thereto, dismissing the petition and remanding petitioner to the custody of respondent.

Since respondent demurred to the petition, the material facts there stated must be taken as true. They are substantially as follows: During the second session of the 72nd Congress the Senate of the United States on February 25, 1933, adopted S.Res. 349, which authorized an investigation of all existing contracts for the

carriage of air and ocean mail. Petitioner is a lawyer and at various times during the past ten years had been employed as such by individuals and corporations engaged in the operation of airplanes over designated routes and otherwise, and had rendered to his clients professional services, some of which related to air-mail contracts, but none of which related to ocean-mail contracts.

On January 31, 1934, there was served on petitioner a *subpoena duces tecum*, issued by the committee of the Senate appointed under the aforesaid S.Res. 349, commanding petitioner to appear before the committee, "instanter, at 12:30 p.m.", and to "bring all books of account, bank pass books, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air-mail and ocean-mail contracts."

Under the filing system in petitioner's office in Washington, the file folders containing the correspondence and documents relating to matters in which petitioner was employed by air-mail contractors included papers relating to other matters.

In compliance with the subpoena, petitioner appeared before the committee on January 31, 1934, and advised the committee that he was ready to produce all papers called for in the subpoena, excepting only communications between himself, as attorney, and his clients; that, as petitioner understood the law, communications, whether oral or written, between attorney and client relating to the subject matter of the attorney's employment are privileged; and that it is not within the power of the attorney to waive such privilege, which belongs exclusively to the client. Thereupon petitioner was sworn as a witness and testified, in substance, *inter alia*, to the names of air-mail operators whom he had represented as attorney; that he had never represented anyone having an ocean-mail contract; and testified to the character of services rendered by him to his clients; and to the character of the communications between himself and his clients which he considered privileged.

Thereupon the chairman of the committee inquired of petitioner if he would telegraph to his clients on the subject of the committee's subpoena. Agreeing to this suggestion, petitioner prepared a telegram to each of his clients and submitted the same to the chairman of the committee, who gave his approval thereto. These telegrams petitioner sent forthwith on January 31, to each and every client who at any time, so far as petitioner's knowledge extended, had any air-mail contract or contracts. These telegrams requested the clients to advise petitioner by wire if they would waive their privilege and authorize him to make communications between them, as attorney and client, available to the Senate committee. Thereupon petitioner, as promptly as practicable, produced and made available to the committee all papers of every kind and description in his possession, power, or control, in any way relating to air-mail contracts, except those alleged to be embraced within his client's privilege.

On February 1st petitioner informed the committee that he had been advised by telegraph that certain of his clients had waived the privilege attached to their communications between them and petitioner, and on that date petitioner produced to the committee all papers of those clients relating to air-mail contracts. On the same day, also, petitioner addressed and sent to clients who had not responded to his request telegrams indicating the necessity of immediate reply regarding the waiver of privilege, as the committee had called upon him to give that information the next morning. On the following day (February 2, 1934) petitioner was again called before the committee under the aforesaid subpoena and testified to the receipt of waivers from all but four of his air-mail clients, and that all papers of those clients who had waived their privilege were immediately available to the committee. Petitioner requested additional time to obtain waivers from the four remaining clients. This request was refused, the committee ruling that the privilege asserted by petitioner did not relieve him of the duty of producing all papers and documents required by the subpoena.

Petitioner insisting that he could not waive the privilege attached to the communications passing between him, as an attorney, and his clients without the consent of the clients, the matter was on February 2nd reported to the Senate by the chairman of the committee (Senate Report No. 254, 2d sess., 73d Cong.). The Senate thereupon passed S.Res. 169, 73d Cong., 2d sess., which directed the issuance of a warrant by the President of the Senate to take petitioner into custody and produce him before the bar of the Senate, and commanding petitioner to " bring with him the correspondence, memoranda, books, files, and records referred to and then and there to answer such questions pertinent to the matter under inquiry with reference to facts regarding correspondence, memoranda, books, and files as the Senate may propound ", and to keep petitioner in custody to await the further action of the Senate. The resolution affirmed that the testimony of the petitioner and the production of correspondence, records, files, and books were material and necessary in order that the committee [select committee, elected pursuant to S. Res. 349, 72d Cong., 2d sess.] might properly execute the functions imposed upon it " and obtain information necessary as a basis for such legislation as the Senate may deem necessary concerning ocean- and air-mail contracts."

Thereupon the warrant was issued and petitioner was arrested by respondent (Sergeant at Arms of the Senate) on the afternoon of February 2, 1934. The senate not then being in session, petitioner was paroled in the custody of his counsel, to appear at the bar of the Senate in the custody of respondent at noon on February 5, 1934.

Shortly prior to the service of the warrant on February 2d, petitioner received waivers from all his remaining clients who had not responded to his telegrams. Promptly on receiving such waivers,

petitioner notified the chairman of the committee, and made available to the committee under the command of its subpoena all papers in his possession relating to air-mail contracts.

One of the addresses of petitioner's telegrams of January 31st, 1934, was L. H. Brittin, vice president of Northwest Airways, Inc., by which company petitioner was employed from March to November 1933. On February 1, 1934, Brittin called at the office of the law firm of MacCracken & Lee in Washington, which petitioner was senior partner. Subsequent to the issuance of the subpoena of the Senate committee petitioner had not seen Brittin nor had there been any communication between him and petitioner. Upon the occasion of his call he saw petitioner's partner, and advised Lee that he had received petitioner's telegram; that, as Lee knew, he, Brittin, had on occasions during the summer of 1933 been permitted as an accommodation to use Lee's office, and that while there in the summer he had dictated and had typed letters of an entirely personal nature, having no relation to air-mail contracts, copies of which letters he had permitted to remain in the folder of the firm's files in which their papers relating to the business of the Northwest Airways, Inc., were contained; and that he desired to remove from the files these personal papers. Thereupon Lee handed to Brittin the folder referred to, and in the presence of Lee he removed therefrom five or six papers. Lee did not see the contents of these papers, but was advised by Brittin that they did not relate to air-mail contracts and were exclusively personal to himself. Petitioner had no knowledge whatever either of Brittin's call or what had occurred during that call until after Brittin's departure. On February 3, 1934, Brittin appeared as a witness before the Senate committee, corroborated petitioner's statement, and further testified that the letters he had removed were purely personal and had "no relation whatever to the matters under consideration" by the committee, and that he had destroyed them. Petitioner testified fully before the Senate committee on February 2nd concerning his lack of knowledge of the taking and destruction of papers by Brittin.

Another addressee of petitioner's telegrams of January 31st was Harris M. Hanshue, president of the Western Air Express, New York City, by which company petitioner was employed as attorney from December 1, 1929, to September 1, 1932. On February 1, 1934, Hanshue by telephone informed petitioner that before his company could make its decision on the subject of the waiver, he desired an opportunity to look over the papers contained in petitioner's files and also to examine certain personal papers, not relating to air-mail contracts, copies of which he believed to be in such files; that he was sending to petitioner's office for that purpose Gilbert Givven, known to petitioner as one-time secretary to Hanshue and as Washington representative of the Western Air Express. Thereupon Givven made an appointment to call at petitioner's office, and did call on the afternoon of February 1st. Petitioner permitted an examination of the

file folders by Givven and permitted Givven to take therefrom, to be delivered to Hanshue, certain papers not relating to air-mail contracts. Among these papers removed were some which did relate to that subject, but which petitioner did not recognize at the time of the removal. On petitioner's appearance before the Senate committee on February 2nd he testified fully with respect to these facts. Immediately following his appearance on that date he communicated with the Western Air Express and requested the immediate return of all papers taken by Givven as aforesaid. On February 3d Givven appeared as a witness before the Senate committee and then and there produced each and every paper taken by him from petitioner's office on February 1st. All of these papers were delivered by Givven to the Senate committee, and all have been in the possession of the committee since February 3d and are now in its possession.

On February 5, 1934, petitioner and his counsel appeared at the office of the Sergeant at Arms of the Senate, petitioner being then and there ready to appear at the bar of the Senate in response to the warrant under which he had been arrested and to produce the papers included within the subpoena and to answer such questions pertinent to the matter under inquiry as the Senate might propound. Without being required or afforded an opportunity to appear at the bar of the Senate, petitioner was on that day by resolution of the Senate ordered to be released from custody under S.Res. 169 and under the warrant issued and served on February 2. Thereupon petitioner was released from custody. Prior to his release from custody under S.Res. 169 petitioner had produced and delivered to the Senate committee, " to the best of his ability, knowledge, and belief, every paper of every kind and description in his possession, or under his control, relating in any way to air-mail " contracts, and since February 5, 1934, such papers " have been and now are " in its possession.

On February 5 the Senate adopted S.Res. 172, 73rd Cong., 2nd sess. It provided that a citation issue directing petitioner, and Brittin, Givven, and Hanshue " to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memoranda from the files of William P. MacCracken, Junior, as shown by the report of the special Senate committee investigating ocean- and air-mail contracts." Pursuant to that resolution, on February 6th the citation issued and was served on petitioner by respondent, commanding petitioner to appear before the bar of the Senate on Friday, February 9, 1934, at 12 o'clock noon, to show cause why he should not be punished for contempt on the grounds stated in the resolution.

On February 8 the Senate adopted a mode of procedure and rules for the trial of petitioner at its bar.

Petitioner did not appear at the bar of the Senate on February 9 as directed, but addressed a communication to the Senate, which was read in open session on that day. In this communication peti-

tioner stated in detail the facts relating to his then knowledge of the so-called "Brittin and Givven incidents" and, *inter alia*, said: "To appear at the bar of the Senate in response to the above-mentioned citation would be to give assent to the exercise by your honorable body of powers which do not constitutionally belong to it and to voluntarily aid in permitting it to violate rights guaranteed to me as a citizen of the United States under the Constitution of my country."

Upon the reading of petitioner's communication, the Senate on February 9 ordered the issuance of a warrant and his immediate arrest. The warrant was issued directing the respondent, as Sergeant at Arms of the Senate, forthwith to arrest and take into custody and bring to the bar of the Senate the petitioner for the purpose set forth in S.Res. 172.

On February 12, 1934, respondent, acting under the authority of the warrant, arrested petitioner.

Challenging the constitutional power of the Senate under the stated facts so to arrest and restrain him, petitioner in the court below filed a petition seeking the issuance of a writ of *habeas corpus*. The writ issued; whereupon respondent filed a demurrer to the petition on the ground "that the same is insufficient in law." After hearing, the court below, without opinion, discharged the writ and remanded petitioner to the custody and control of respondent.

Petitioner concedes that S.Res. 169 and the warrant served thereunder were adopted and issued in the performance of a legislative function, but contends that S.Res. 172 and the warrant served thereunder were adopted and issued in the attempted exercise of a judicial function.

It is established law that the two Houses of Congress separately possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make effective the express powers; that the power of inquiry, with process to enforce it, is an essential and appropriate auxiliary to the exercise of the legislative function. *Marshall* v. *Gordon*, 243 U.S. 521; *McGrain* v. *Daugherty*, 273 U.S. 135; *Sinclair* v. *United States*, 279 U.S. 263.

In the *Marshall case* the question involved was whether the House of Representatives had exceeded its power in punishing as for contempt of its authority a person, not a Member, who had written and sent to the chairman of one of its committees an ill-tempered and irritating letter respecting the action and purposes of the committee. It was ruled that it had.

The *Daugherty case* involved the power of the Senate, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and whether in the case before it the process was being employed to obtain testimony for that purpose. The court determined each issue in the affirmative.

In the *Sinclair case* the court sustained a conviction of the defendant under sec. 102, R.S., for refusing to answer questions propounded to him before a committee of the Senate.

In the *Marshall case* the court observed that the auxiliary power rests upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. "The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted." (243 U.S. at p. 541.) The court pointed out that in *Anderson* v. *Dunn* (6 Wheat. 204, 231) the answer to the question as to the extent of the implied power of legislative assemblies to deal with contempt was declared to be "*the least possible power adequate to the end proposed.*" The court then said (243 U.S. at p. 542): "Without undertaking to inclusively mention the subjects embraced in the implied power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed." The court further pointed out that in its historical review it had been able to discover "no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, *the penalty or punishment for the refusal remaining controlled by the general criminal law.*" [See secs. 101–104 and 859, Rev. Stat.; secs. 191–194, tit. 2, and sec. 634, tit. 28, U.S.C.] (Italics ours.) The court also said (243 U.S. at pp. 544–545) that where a particular act because of its interference with the right of self-preservation comes within the jurisdiction of either House to deal with directly under an implied power to preserve their functions "and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, * * *. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion *how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence;* that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference." (Italics ours.)

But in the *Marshall case*, as in *Kilbourn* v. *Thompson*, 103 U.S. 168 (which involved a contempt proceeding instituted by the House), the Court held that the House had exceeded its power. If controlling limitations or restrictions are disregarded, the decisions in the two cases just alluded to "point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn* v. *Thompson* and *In re Chapman* [166 U.S. 661] that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." *McGrain* v. *Daugherty*, 273 U.S. 135, 176.

In the *Marshall case* the court finally stated that the conclusions reached brought about "a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated by the Constitution"; that State constitutions written before the adoption of the Constitution of the United States substituted, for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons, "a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion and yet at the same time not substantially interfer with the great guaranties and limitations concerning the exertion of the power to criminally punish—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted." (243 U.S. at p. 546.)

In the light of the controlling authorities to which we have referred, we come to consider the facts in the present case. As we have already observed, petitioner concedes, as indeed he must, that the Senate was acting within its constitutional limitations down to the adoption of S.Res. 172 and petitioner's arrest thereunder. The stated purpose of S.Res. 169 was to compel the appearance and testimony of petitioner in order that the committee might properly execute the functions imposed upon it and obtain information necessary as a basis for legislation. Petitioner alleges, and the demurrer admits, that, prior to the adoption of S.Res. 172 and petitioner's arrest thereunder, he had produced and delivered to the Senate every paper of every kind and description in his possession or under his control relating in any way to air-mail contracts; that he had appeared as a witness before the Senate committee and answered all questions propounded to him; and that he stands ready to appear before the committee at any time and to answer all pertinent and material questions.

The declared purpose of S.Res. 172 was to command the appearance of petitioner, and Brittin, Givven, and Hanshue to show cause why they should not be punished for contempt of the Senate, "on account of the destruction and removal of certain papers, files, and

memoranda from the files of William P. MacCracken, Junior, after a subpena had been served upon William P. MacCracken, Junior, * * *." The purpose was not the production of documents nor to compel the testimony of a witness. This is made more manifest by the inclusion in the resolution of Brittin, Givven, and Hanshue, who had a part in the removal or destruction of the papers alluded to in the resolution. There is no suggestion that the purpose of this resolution was other than the punishment of the named individuals for the part they had taken in the removal or destruction of papers. While petitioner's act in permitting Givven to take from his files papers covered by the subpoena was ill-advised and well calculated to arouse suspicion, those papers, prior to the adoption of S.Res. 172, had all been returned and delivered to the Senate committee and, as the petition alleges, "are now in its possession." On the facts admitted, petitioner was not responsible for the taking and destruction of papers by Brittin, but, even assuming that he was, his punishment by the Senate would operate "not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418. There is no suggestion in the record that at the time of the adoption of S.Res. 172 any further or additional information or papers were in the possession of petitioner and were being withheld. Nor is there any suggestion that other and additional information was required. Indeed, concurrently with the adoption of S.Res. 172, the release of petitioner from custody under S.Res. 169, which in its preamble specifically stated that the testimony and papers of petitioner were necessary in the discharge of the Senate's legislative function, indicates that the necessity therefor had ceased to exist or that the information had been furnished to the Senate. In other words, the Senate thereafter was not seeking, by coercion or otherwise, the furnishing of information through testimony or the production of papers; its inquiry in aid of its legislative function had ended so far as petitioner was concerned. How, then, in reason can it be said (as in the *Marshall case*, 243 U.S. at p. 545) that "there is necessity for repression to prevent immediate recurrence" of the act? Is it not plain that the sole purpose of the Senate in the adoption of S.Res. 172 and petitioner's arrest thereunder was punishment, and punishment as such?

Time and again it has been declared that Congress possesses legislative power in the amplest degree to provide for prosecution and punishment under the criminal law for any and every wrongful act. Secs. 101–104 and 859 of the Revised Statutes were enacted under that power and show plainly that Congress intended thereby "to subject defaulting and contumacious witnesses to indictment and punishment in the courts, and thereby to enable either house to exert the power of inquiry 'more effectually'." *McGrain* v. *Daugherty*, 273 U.S. 135, 168.

Unless there is to be an intermingling of the legislative and judicial power to deal with contempt, thereby rendering it possible in all cases as a matter of legislative power summarily to try one thus accused without subjecting him to the statutory modes of trial provided for criminal offenses, protected by the limitations and safeguards of the Constitution, then we must and do declare that the Senate is without jurisdiction to inflict punishment on the petitioner under S.Res. 172.

The judgment therefore is reversed, and the cause remanded, with directions to discharge petitioner from custody.

Reversed and remanded.

GRONER, *J.:* I am unable to concur in the conclusion reached by the court in this case. I shall state the reasons of my dissent briefly.

The essential facts to an understanding of the case are fully set out in the opinion, and it is not necessary or desirable to repeat them here. The sole question involved on this appeal is the power of the Senate to arrest and bring before it for punishment a private citizen who, after being served with subpoena requiring him to produce his files relating to a matter then properly under investigation, allows documents in the files to be withdrawn so that he cannot comply with the terms of the subpoena.

The opinion of this court holds, and properly holds, that the Senate had a right to require the production of the documents in question, and likewise, that the Senate had the power to punish petitioner if he refused to produce them; but also holds that since the offense charged against petitioner is not the refusal to deliver, but the doing of an act which made delivery by him impossible, the Senate had no authority to inflict punishment, since punishment in such case would not be coercive but punitive.

The opinion relies upon *Marshall* v. *Gordon* (243 U.S. 521). In that case, as in the others cited in the opinion, the rule is stated to be that in addition to the express powers of Congress under the Constitution in relation to the punishment of its own Members, each House has implied power to punish outsiders for contempts; that this power rests upon the legislative power granted to Congress, and that that which is "reasonably appropriate and relevant to the exercise of a granted power [is] to be considered as accompanying the grant." Speaking of this implied power, the Supreme Court in *Marshall* v. *Gordon* (at p. 541) said the power grows out of the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. "The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end, and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted." It has therefore been decided (*McGrain* v. *Daugherty*, 273 U.S. 135)

that the power to punish for contempt embraces the power to compel the production of documents in order that the legislative functions may be performed and, for the same reason, to compel a witness to testify and to punish him for contempt either for refusal to testify or to produce documents—"the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel."—But in the opinion of this court this implied power is held not to comprehend also the power to impose punishment for a past act, even though the result is to prevent the discharge of a legislative duty where the effect is to make the legislative purpose futile. The reasoning to support this view, I think, is unsound. I am not unmindful of the fact that *Marshall* v. *Gordon* contains an "argumentative dictum" to support the conclusion; but the facts on which that case rests are wholly different from those present here.

In that case the letter which Marshall published was held not to amount to obstruction. In this case petitioner was cited to appear and show cause why he should not be punished for contempt on account of the destruction and removal, after service of the subpoena, of certain papers, files, and memoranda, which the Senate believed to be necessary in the discharge of its legislative duties. To say at one moment that the power exists to punish for failure to deliver papers, and then to say that it is lost if the contumacy of the witness results in destruction rather than in deliberate withholding, seems to me to be both inharmonious and absurd. In the investigation then under way, the Senate was proceeding to obtain information in aid of legislation. It demanded the production of certain papers, of which petitioner had possession. Petitioner, when summoned to produce the papers, explained that he could not do so because he had allowed them to be removed by a client. Did this act of petitioner, which made compliance with the subpoena impossible, convert the contempt into an offense for which punishment could only be imposed—if at all—by another tribunal? I can think of no good reason to suppose it did. The answer, it seems to me, depends upon the question, whether the act complained of tended to obstruct the free exercise by the Senate of its legislative functions. If it did, manifestly it was a contempt of the authority which had a right to require it to be done. To admit this and then to say that, because the nature of the act done made compliance impossible, the authority to impose punishment for the recalcitrancy was lost, appears to me to establish a distinction destructive of the purpose out of which the right arises and to make the power itself impotent and fruitless. In the *Marshall case* the power of the Congress, or of either House, to punish for contempts is said to arise out of the necessity of "self-preservation." That term implies power from within—the intrinsic capacity of self-vindication, and this element

or quality is inherent because without it, the right to do the things necessary to carry out the powers given would be dependent upon extraneous circumstances and outside agencies. Considered in this view, it seems to me to follow that there can be no real self-preservation in a case in which an admitted right is subject to successful challenge in any other tribunal than the one in which the right inheres. Nor am I willing to assent to the proposition, that, because the power is coercive, that is to say, in aid of a pending investigation or of legislation, it is any the less complete or is exhausted by the conclusion of the investigation or the exaggeration of the offense by the offender. To admit such a proposition would seem to me to be altogether destructive of the power.

That the right, as well as the power, is limited by constitutional safeguards for the liberty of the citizen and that it may not be exercised capriciously or arbitrarily, or the power of the courts to inquire into its exercise questioned, is one thing, but it is quite another, that the refusal to do that which there is legislative power to compel can be punished only so long as the recusant remains obdurate from unwillingness to do the thing commanded, and the right is lost in a case in which he puts it beyond his own power to obey. What has just been said is in discussion of the single legal principle involved. The justification or extenuation of the act complained of here has no place in a proceeding of this character, but, considered purely in the one aspect, whether the Senate has the power to punish for contempt where, after service of subpoena requiring the production of records, the person subpoenaed destroys the records, it is no answer, as I think, to say that the act of destruction nullifies the power of punishment inherent in the legislature, and I think it was this which, in the *Marshall case*, Chief Justice White had in mind, when, after noting the instances in which no attempt was made to impose restraint "after it became manifest that there was no room for a legislative judgment"—he said, "where a particular act, because of its interference with the right of self-preservation, comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions, and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power, the right to determine, in the use of legitimate and fair discretion, how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence; that is to say, the con-

tinued existence of the interference or obstruction to the exercise of the legislative power."

Much emphasis is laid by petitioner on the words "immediate recurrence", but I think the emphasis misplaced. The language quoted is susceptible, as I think, of only one interpretation, viz., that where the power exists and is exercised, it cannot be destroyed by the act of the person against whom it is asserted, and this, even though the further exertion of the power is obviously not in aid of the particular legislation then under consideration. And so, in my view, while the power is implied as a necessary ingredient to the discharge of the functions of Congress, that is to say, as a means of procuring information in aid of legislation, when properly exerted, it is intrinsic to the discharge of its constitutional duties, which in such cases embrace the power to punish those who obstruct its proceedings both as a corrective to the individual and a deterrent to others.

I think the judgment below should be affirmed.

I am authorized by Judge Hitz to say he concurs in this dissent.

A true copy.
Test:

Clerk, United States Court of Appeals
for the District of Columbia.

Monday, July 9, A.D. 1934

* * * * * * *

No. 6166. April term, 1934

WILLIAM P. MacCRACKEN, JR., APPELLANT

v.

CHESLEY W. JURNEY

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed without costs and that this cause be, and the same is hereby, remanded to the said Supreme Court with directions to discharge petitioner from custody.

Per Mr. Justice ROBB.

July 9, 1934.

Mr. Justice Hitz and Mr. Justice Groner dissent.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

January term, 1934

No. 6166

WILLIAM P. MACCRACKEN, JR., APPELLANT

v.

CHESLEY W. JURNEY, APPELLEE

Praecipe for record

In connection with a petition for a writ of certiorari, the cler will please prepare a transcript of the record in the above-entitle cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the court.
4. The judgment.
5. This designation.
6. Clerk's certificate.

LESLIE C. GARNETT,
United States Attorney, Attorney for Appellee.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, clerk of the United States Court of Appeal for the District of Columbia, do hereby certify that the foregoin printed and typewritten pages numbered from 1 to 123, inclusiv constitute a true copy of the record and proceedings of said Cou of Appeals as designated by counsel in the case of *William P. Mac Cracken, Jr., appellant*, v. *Chesley W. Jurney*, No. 6166, April term 1934, as the same remain upon the files and records of said Cou of Appeals.

In testimony whereof I hereunto subscribe my name and affix th seal of said Court of Appeals, at the city of Washington, this 12t day of July, A.D. 1934.

HENRY W. HODGES,
Clerk of the United States Court of Appeals,
for the District of Columbia.

[SEAL] By MONCURE BURKE,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 193

Order allowing certiorari

Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE, 1934